



Principle and Compromise in Constitutional Adjudication The Eleventh Amendment and State Sovereign Immunity

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PRINCIPLE AND COMPROMISE IN
CONSTITUTIONAL ADJUDICATION:
THE ELEVENTH AMENDMENT AND
STATE SOVEREIGN IMMUNITY

*Vicki C. Jackson**

The Court's Eleventh Amendment and sovereign immunity case law deserves the condemnation and resistance of scholars. The Court has for the last ten years chosen to expand the range of government immunity from suit for wrongdoing, a result compelled neither by history nor logic. But in elevating state sovereign immunity to the status of a constitutional principle of the first order, the Court has not met with the barrage of criticism I believe it deserves on this front. While there has been no shortage of critics, there has also been no shortage of good thoughtful scholarship defending or seeking to rationalize the Court's results. While I believe it is an important function of legal scholarship to constructively critique and seek to rationalize the Court's decisions, I hope in the first portion of this Article to explain why I do not think these decisions are worthy of that effort, and why scholars who believe the Court is incorrect in its expansion of sovereign immunity into a first order constitutional principle ought to call for the overruling of these decisions.¹

* Professor of Law, Georgetown University Law Center. My thanks to Jim Pfander, who organized the American Association of Law Schools (AALS) Federal Courts Panel January 8, 2000, for which this Article was prepared and to the *Notre Dame Law Review* for publishing this Symposium. My gratitude to my husband and best critic, Robert Taylor, for his willingness to read yet another draft paper on the 11th Amendment, and to Jim Pfander, Carlos Vázquez, and Ann Woolhandler for helpful comments on earlier drafts. Thanks also to my research assistants Beth Heinold, Shannon McNulty, and Mike Ryan for their good-natured and very helpful research assistance.

1 For an additional analysis and critique of last Term's sovereign immunity decisions, see Vicki C. Jackson, *Seductions of Coherence, State Sovereign Immunity and the Denationalization of Federal Law*, 31 *RUTGERS L.J.* (forthcoming 2000).

Let me be clear at the outset that I do not ground my critique of the Court's *Seminole Tribe v. Florida*² and *Alden v. Maine*³ decisions, nor my plea for the Court to overrule itself, on a claim that the Constitution requires "full remediation" for all wrongs or for all violations of federal law. Remedial systems need to be designed with multiple goals in mind.⁴ As John Jeffries reminded us in a recent and elegant essay, some forms of relief may be limited in order to avoid unintended and undesirable consequences of deterring socially useful conduct.⁵ But limits on remedies for violations of federal rights should be grounded in reason and function, wherever possible; and while history has some role to play, it must be consulted with caution where it is ambiguous and where one contested historical interpretation is opposed to current understandings of justice. Federal courts scholars, like other constitutional scholars, should not be afraid of invoking the Preamble to the Constitution to inform interpretive choices that must be made—including its commitment to the formation of a "more perfect Union" and to "establishing Justice."⁶ That sovereign immunity may have long provenance—as did prayer in schools, as did the suppression of women, as did Jim Crow laws—does not end the questions of whether the immunity is constitutionally compelled, how the immunity can be overcome, how broadly it extends, and who shares in it.

In the second portion of this Article, I comment more specifically on the arguments of Professors Vázquez⁷ and Woolhandler,⁸ as was my assigned role at the American Association of Law Schools (AALS) panel. In brief, while I find Professor Woolhandler's scholarship always illuminating, I question her effort to justify the Court's recent sovereign immunity decisions as based on a defensible distinction between new and old property for three reasons: first, the historical practice does not speak to Congress's powers to overcome common

2 517 U.S. 44 (1996).

3 119 S. Ct. 2240 (1999).

4 For a thoughtful discussion of the competing constitutional traditions and interests, see Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1733 (1991).

5 See John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999) (arguing that the qualified immunity doctrine for government officials is necessary to avoid over-detering official action and to allow room for the development and evolution of legal standards governing their conduct).

6 U.S. CONST. preamble; see also John Paul Stevens, *Is Justice Irrelevant?*, 87 NW. U. L. REV. 1121 (1993).

7 See Carlos Manuel Vázquez, *Eleventh Amendment Schizophrenia*, 75 NOTRE DAME L. REV. 859 (2000).

8 See Ann Woolhandler, *Old Property, New Property, and Sovereign Immunity*, 75 NOTRE DAME L. REV. 919 (2000).

law immunity; second, the historic practice she focuses on is primarily from the nineteenth century and does not fully account for the last century's decisions; and third, the normative justifications she proffers, while they would support rules limiting the form of compensatory awards that could be entered against sovereign governments, do not support the present rules of immunity. Professor Vázquez's careful examination of the analytical foundations of the Court's recent cases illuminates their internal tensions, though I suggest he may be reading too much into the Court's analysis of Section 5 of the Fourteenth Amendment.⁹ I take issue with his qualified defense of constitutionalizing official immunities (especially for executive branch officers), a position that I understand to be at least in part driven by considerations of coherence with a strand of the Court's sovereign immunity decisions that he seems essentially to disagree with. Finally, I note, neither Professor Woolhandler's invocation of history to justify distinctions in the treatment of different forms of property interests, nor Professor Vázquez's concern for constructing the best (or a good) system for deterring governmental law violations, correspond to the Court's own explanations of its decisions.

In the closing Section of this Article, I identify a further difficulty in understanding the Court's treatment of state sovereign immunity claims and make a suggestion for an alternative doctrine to better capture legitimate national interests in preserving both the states and the federal government as governments. First, I explore the Court's paradoxical treatment of federalism and the Fourteenth Amendment from the perspective of interpretive strategies for dealing with constitutional compromises and constitutional principles. When will the federalism features of the Constitution be treated as political compromises, not generalizable to principles broader than required by the Constitution's text, and when will the federalism features be treated as sources of deep, principled values, emanating implied limitations on national power? When will provisions that are proposed and ratified as "compromises" become deep "principles"—and when can deep "principles" on ratification become "narrow compromises," or less deep principles, for purposes of interpretation? I suggest that even those who believe that the Eleventh Amendment bars at least some "federal question" cases from federal jurisdiction should see the initial adoption of the Amendment as reflecting a narrow compromise. One could then ask whether circumstances have changed so as to justify treating the Amendment as standing for a broader principle

9 U.S. CONST. amend XIV, § 5.

of immunity—a process that was begun in *Hans v. Louisiana*,¹⁰ curtailed in the 1960s–80s, and then reinvigorated in *Seminole Tribe*.¹¹

Federalism does represent a deep principle of the U.S. constitutional system, one primarily to be secured through the political structure of the Union. Judicial doctrine should be designed not to confront the political branches' political judgments but rather to assure that in the political process the interests that the Constitution requires to be protected—interests in the states continuing to exist as independent governments—have been taken into account. In addition to clear statement rules, I suggest that a presumption of symmetry could be applied to evaluate the constitutionality of remedies against states provided for in federal statutory law enacted under Article I power. This presumption would be designed to harness the national political branches' solicitude for the functioning of the federal government to secure a comparable solicitude for the functioning of state governments. But sovereign immunity should be of far less importance in sustaining that federal structure than the Court's current doctrine contemplates, particularly since sovereign immunity is in conflict with other fundamental principles of the U.S. constitutional system including the rule of law and the supremacy of federal law.

I. A BRIEF CRITIQUE OF LAST TERM'S TRILOGY

Since other contributions to this Symposium clearly and fully explicate the Court's decisions,¹² I will only briefly discuss some of their most serious shortcomings.

A. *Florida Prepaid v. College Savings Bank*

Of the three sovereign immunity decisions last Term, in some respects the most surprising was *Florida Prepaid Postsecondary Education*

10 134 U.S. 1 (1890).

11 517 U.S. 44 (1996).

12 See, e.g., Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011 (2000). After the AALS panel for which this Article was prepared, the Court decided *Kimel v. Florida Board of Regents*, 120 S. Ct. 631 (2000), holding that the Age Discrimination in Employment Act, 29 U.S.C. §§ 621–34 (1994) (ADEA) was not a valid exercise of Congress's power to enforce the 14th Amendment and thus could not constitutionally abrogate states' immunity from suit. While I do not address *Kimel* here, note that because the ADEA's extension to the states has been upheld under the Commerce Clause, the ADEA now appears to be like the Fair Labor Standards Act, 29 U.S.C. § 216(b) (1994), and the patent laws: it is a valid federal statute validly applied to cover activities of state governments but only partially enforceable as against those state governments.

Expense Board v. College Savings Bank.¹³ The Court there held unconstitutional the abrogation of states' immunity to suit in federal court on patent infringement claims, even though the Court agreed that patents were property, the deprivation of which without due process could violate the Fourteenth Amendment, which in turn would give Congress power to abrogate states' immunity. The Court held the abrogation unconstitutional, however, primarily because it found inadequate evidence before Congress of any unconstitutional state conduct, other than a few asserted infringements. These infringements might constitute deprivations of property,¹⁴ but by themselves did not constitute deprivations without due process of law. Rather, the Court said, Congress should have examined whether state law remedies for proven infringements would have been sufficient to avoid an unconstitutional deprivation of property. The Court thus apparently concluded that the mere assertion of sovereign immunity to a patent suit in federal court was not sufficient to constitute a deprivation without due process of law, since there were possibilities for relief either in state courts or before state legislatures.¹⁵

In addition, the Court held, the remedy Congress provided—an abrogation of immunity on all patent claims against any infringing state—was not “proportionate” to possible constitutional injuries. This conclusion, as well, rested on the absence of evidence before Congress that many states were infringing patents and failing to provide some form of process or remedy that the Court would find adequate. The opinion suggests that because there was no “pattern” of state infringements, a nationwide remedy would be disproportionate.¹⁶ Moreover, even in the states against which infringement claims had been asserted, it was unclear that there were inadequate state court remedies.¹⁷ Thus, in the Court's view, the Patent and Plant Variety Protection Remedy Clarification Act's uniform abrogation of im-

13 119 S. Ct. 2199 (1999).

14 *But see id.* at 2209–10 (suggesting that negligent infringements would not be treated as “deprivations”). For a critical discussion, see Meltzer, *supra* note 12, at 1056–61.

15 *See Florida Prepaid*, 119 S. Ct. at 2207 (characterizing the underlying conduct as “state infringement of patents and the use of sovereign immunity to deny patent owners compensation for the invasion of their patent rights”); *id.* at 2209 n.9 (noting that Florida “provides remedies” for patent infringements by the state through “a claims bill” in the state legislature or a judicial remedy for takings or conversion).

16 *Id.* at 2207 (“Congress identified no pattern of patent infringements by states, let alone a pattern of constitutional violations.”).

17 *See id.* at 2207–10.

munity could not be justified under the "proportionality" test of *City of Boerne v. Flores*.¹⁸

The decision is surprising, particularly in light of the harm it undoubtedly inflicts on commercial interests. As Judge Fletcher's article suggests, when states engage in commercial activities in competition with private enterprise, the balance of federal interests as against state sovereignty would favor federal power.¹⁹ The Court's holding represents an astonishing "denationalization" of federal law in an area that had been exclusively federal.²⁰ The enforceability of patent (and possibly copyright)²¹ laws as against states, which are becoming major users of patents and the patent system, will now depend in large measure on the individual decisions of each state as to what remedies to provide.

Second, the decision reflects a disturbingly parsimonious view of Congress's powers under the Fourteenth Amendment.²² I would have

18 521 U.S. 507, 519–20 (1997) (stating that in using its Section 5 power prophylactically to prohibit conduct that does not itself violate Section 1 of the 14th Amendment, Congress must choose means that are proportional and congruent with the Section 1 violations it seeks to remedy or prevent). For my earlier discussions of *Flores*, see Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on "Proportionality," Rights and Federalism*, 1 U. PA. J. CONST. L. 583, 623–34 (1999) (arguing that a proportionality standard, deferentially applied to identify instances of gross disproportionality between purported ends and chosen means, might function as a milder form of "pretext" examination of congressional purpose), and Jackson, *supra* note 1 (arguing that *Florida Prepaid* was a significant extension of the rigor with which the *Flores* proportionality standard was applied).

19 See William A. Fletcher, *The Eleventh Amendment: Unfinished Business*, 75 NOTRE DAME L. REV. 843 (2000).

20 See Jackson, *supra* note 1.

21 But cf. *Florida Prepaid*, 119 S. Ct. at 2215 n.9 (Stevens, J., dissenting) (noting bases on which to distinguish and uphold the Copyright Remedy Clarification Act's abrogation of immunity).

22 Professor Vázquez argues that, given the Court's view that remedies other than monetary suits against states are sufficient to protect the interests of the federal government in the supremacy of federal law, it will be almost impossible to meet the standard he believes the Court has provided for 14th Amendment abrogations—that abrogation of immunity be "genuinely necessary." Vázquez, *supra* note 7, at 862, 897–900 (quoting *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2225 (1999)). Vázquez reads this sentence—correctly, in a grammatical sense—to suggest a requirement that, even if Section 1 violations are established, the particular remedy must be "genuinely necessary." *Id.* He appears to interpret this, in turn, to mean something like "absolutely necessary"—that is, along the lines of the interpretation of the Necessary and Proper Clause advocated by the State of Maryland in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), which was rejected by the Court. Given these interpretations, Vázquez goes on to argue that the Court might find that so long as such other remedies as the *Ex parte Young*, 209 U.S. 123 (1908), injunction or the possibility of suit by the United States exists, no such

thought Congress perfectly entitled to conclude that, since federal jurisdiction over patents was exclusive, no state would provide a state court remedy for patent infringement. It would thus also have been reasonable for Congress to conclude that, if states raised immunity as a bar to federal patent infringement suits, they had denied due process of law in the most fundamental way—a claim of “deprivation of property” being stated by a claim of patent infringement, the state was denying the opportunity for law to operate to determine the truth and value of the claim.

The Court’s refusal to treat invocation of sovereign immunity in response to a claim of patent infringement as a denial of due process authorizing Congress to overcome the immunity under its Fourteenth Amendment powers is also surprising because of the clearly commercial character of the activity in which states were engaged in competi-

absolute or “genuine” necessity can be established, and hence, Congress would never have power to abrogate immunity. See Vázquez, *supra* note 7, at 898.

However, it is not clear to me that this is the best or most likely reading of this portion of *College Savings Bank*, though given Professor Vázquez’s past success in reading the tea leaves of the Court’s opinions, see Carlos Manuel Vázquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1714–22 (1997), there is no doubt reason for concern. But I would suggest an alternative interpretation of this language. Recall that in *College Savings Bank* (unlike in *Florida Prepaid*) the Court found that the first predicate for a Section 1 violation—that the Lanham Act protected a “property interest”—did not exist. See *College Sav. Bank*, 119 S. Ct. at 2224. The “genuinely necessary” language may, then, hark back to a *Boerne v. Flores* issue—of whether there are any, or enough, “genuine” (in the Court’s view) violations of Section 1 to authorize any prophylactic use of the Section 5 power: if there are no violations of the 14th Amendment, Congress’s invocation of the Section 5 power may not be “genuine.”

I fully agree with Professor Vázquez that the Court’s narrow interpretations here are in part motivated by its desire to avoid “undermining” *Seminole Tribe* by allowing Congress to protect rights created under Article I statutes through the 14th Amendment. While Professor Vázquez appears to find this effort appropriate, or at least tolerable, see Vázquez, *supra*, at 1744 (characterizing the use of the 14th Amendment powers to authorize remedies against states for violating rights created under legislation under Article I as threatening to “reduce *Seminole Tribe’s* . . . holding to nothing”), I do not. I believe that this effort to deliberately trim Congress’s powers under Section 5 of the 14th Amendment undervalues the intended nationalizing effect of the 14th Amendment on the protection of federally derived rights. (Given the inventiveness of lawyers, and the possibilities for flexibility offered by our system of common law constitutional adjudication, however, questions about the scope of the 14th Amendment in securing national rights against state action may now proceed to be litigated in connection with the Privileges and Immunities Clause, after *Saenz v. Roe*, 119 S. Ct. 1518, 1526 (1999)). Finally, while I share Professor Vázquez’s concerns about the effect of the Court’s decisions on the protection of “countermajoritarian” constitutional rights under the 14th Amendment, see Vázquez, *supra* note 7, at 898–90, I am not so convinced that this Term’s decisions render Section 5 a nullity—though they do significantly impair its reach.

tion with private businesses. One of the principal purposes of the 1787 Convention's "more perfect Union" was to facilitate commercial transactions and provide a more secure economic environment through a federally enforceable and uniform legal regime for the development of trade.²³ Moreover, when states acted in a commercial setting, long-standing doctrine was available that would have sustained either a holding that states had waived their immunity by engaging in federally regulated commercial conduct,²⁴ or that the entity in question was not the "state" for purposes of the immunity.²⁵ The Court, in a companion case, rejects the waiver theory and, apparently, the distinction between commercial and governmental activities as a possible basis for curtailing the reach of the immunity.²⁶ The Court, in my judgment, was driven by a desire not to "circumvent" the "principle" of *Seminole Tribe* by too easily permitting Congress to protect interests created under Article I through its Fourteenth Amendment powers. In so doing, the Court fell prey to the seductive logic of coherence, falsely; for it ignored other doctrines that it should have cohered to, minimizing the nationalizing effect of the Fourteenth Amendment.²⁷

Finally, *Florida Prepaid* appears to represent a very expansive view of what procedures will satisfy due process. The Court not only suggests that procedures and remedies less than those provided for in the federal patent laws will suffice to satisfy due process concerns that arise from state infringements of private patents. It also may be taken to suggest that the states may not even need to extend a judicial remedy, implying that legislative private bills may be sufficient.²⁸ At a minimum, however, the Court was prepared to reject the implied finding of due process violations from the undeniable uncertainties

23 See, e.g., MERRILL JENSEN, *THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION 1781-1789*, at 400-06 (Northeastern Classics ed. 1981) (arguing that while state legislation on foreign trade was effective, "American merchants wanted a uniformity which only centralized control could provide"); JACK RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 26-27* (1997). I do not mean to suggest that the Constitution was designed only to better protect commercial interests, but that this was one of its important purposes.

24 See, e.g., *Parden v. Terminal Ry.*, 377 U.S. 184, 190-92 (1964), *overruled by College Sav. Bank*, 119 S. Ct. at 2228; cf. *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959).

25 See, e.g., *Briscoe v. Bank of Ky.*, 36 U.S. (11 Pet.) 257 (1837); *Bank of the United States v. The Planters' Bank*, 22 U.S. (9 Wheat.) 904 (1824). The question of whether the Florida Prepaid Fund was an arm of the state had been litigated in the lower courts and was not before the Supreme Court. See *infra* note 35.

26 See *College Sav. Bank*, 119 S. Ct. at 2230-33 & n.4.

27 See Jackson, *supra* note 1.

28 See *Florida Prepaid*, 119 S. Ct. at 2209-11 & n.9.

surrounding the question of what remedies would be available at the state level for patent infringements. The Court's apparent willingness to allow states time to develop remedies for infringements of patents under state law²⁹ led it to an unprecedented departure from exclusive federal jurisdiction over patent and copyright that had been a bed-rock of judicial federalism.

B. College Savings Bank v. Florida Prepaid

The Court's holding in *College Savings Bank v. Florida Prepaid Post-secondary Education Expense Board*³⁰ was somewhat less surprising. The Court decided that the Lanham Act's ban on unfair methods of competition did not protect "property" for purposes of the Due Process Clause—perhaps for some of the reasons suggested by Professor Woolhandler's article.³¹ The lower court had so held, reasoning that recognition of the claim could open the states to rather unlimited and difficult to predict forms of damages. The Court may have been seeking to limit the constraining nationwide effects of a broader definition of property.

What was more surprising was that the Court took the opportunity to reject the doctrine of waiver by engaging in regulated activity. In order to so hold, the Court had to overrule yet another of its earlier state sovereign immunity cases—*Parden v. Terminal Railway*³²—from 1964. Given the degree to which state governments have undertaken commercial activities in competition with private enterprise,³³ it is un-

29 Cf. Ann Althouse, *The Alden Trilogy: Still Searching for a Way to Enforce Federalism*, 31 RUTGERS L.J. (forthcoming 2000) (arguing that the Court's decisions provide both Congress and the states opportunities in the future to prove their trustworthiness in design and administration of federal rights, including for states the opportunity to provide appropriate relief in state courts for infringements of patents).

30 119 S. Ct. 2219 (1999).

31 See generally Woolhandler, *supra* note 8.

32 377 U.S. 184 (1964).

33 For example, all 50 states currently offer either a prepaid tuition and/or tuition savings plan. See *State of the States: State College Savings Plan Overview* (visited Jan. 10, 2000) <<http://www.collegesavings.org/state-table.htm>>; see also J. Timothy Philipps & Ed R. Haden, *It's Not Love, But It's Not Bad: A Response to Critics of Prepaid College Tuition Plans*, 26 U. RICH. L. REV. 281, 309–310 (1992) (asserting that state plans allow the middle class to save for college without being sophisticated investors); Amy Remus Scott, Note, *A Commerce Clause Challenge to New York's Tax Deduction for Investment in Its Own Tuition Savings Program*, 25 U. MICH. J.L. REFORM 379, 379 (1999) (finding that these programs provide attractive alternatives to private investment because they "offer significant federal tax benefits to individuals who invest in the programs"). Patents have been issued to state universities, presumably for competitive use in such fields as biomedical technology. See *Florida Prepaid*, 119 S. Ct. at 2215 & n.8 (Stevens, J., dissenting); see also Rebecca Eisenberg, *Public Research and Private De-*

tenable to have a doctrine that allows states—when acting in their commercial capacity—to compete at so substantial an advantage with private businesses. As Judge Fletcher suggests in his article, the arguments in favor of permitting Congress to subject states to suit under a statute Congress has enacted under the commercially oriented powers of Article I may be as compelling (though for different reasons) as under the Fourteenth Amendment. States should have less legitimate reason to object to application of the provisions of statutes enacted under Article I, which are typically directed at business activities engaged in by private entities that the states have chosen to be involved in as well.³⁴ Certainly the provision of long-term investment opportunities to pay for the education of one's children has long been the subject of private enterprise, with which the State of Florida, through the Florida Prepaid Educational Investment Fund, entered into competition.³⁵ The concept of constructive waiver, constrained (as per

velopment: Patents and Technology Transfer in Government-Sponsored Research, 82 VA. L. REV. 1663 (1996). At least 38 states use lotteries for the raising of state revenue, but Nevada does not permit a state lottery, "[p]erhaps [because] this would be seen as competing with one of the states' major industries." NATIONAL SURVEY OF STATE LAWS 511 (Richard A. Leiter ed., 2d ed. 1997). Commercial aviation also appears to face competition from government entities that receive "payment for commercial air services while at the same time claiming exemption from most regulations administered by the FAA as 'public aircraft.'" Lorraine B. Halloway, *New Challenge for the Private Sector: Competition from "Public Aircraft,"* 8-SPG AIR & SPACE LAW 1 (1994) (arguing that, by claiming exemptions from regulation, government operated public aircraft are able to operate at lower costs than commercial aircraft). In addition, investment of public pension funds gives states considerable influence in the private sector. "For firms, public pension systems can represent both a source of more than \$1.7 trillion in investment funds and an occasional meddlesome voice in corporate governance." Steven L. Willborn, *Public Pensions and the Uniform Management of Public Employee Retirement Systems Act*, 51 RUTGERS L. REV. 141, 142 (1998); see also Roberta Romano, *Public Pension Fund Activism in Corporate Governance Reconsidered*, 93 COLUM. L. REV. 795 (1993).

34 See Fletcher, *supra* note 19, at 849.

35 In the district court, College Savings Bank argued, unsuccessfully, that Florida Prepaid should not be treated as an "arm of the state" entitled to share in the state's 11th Amendment immunity. Despite the fact that the fund had not been supported by state taxes and had its own liability insurance, the district court, applying the Third Circuit's multi-factor test, found that it was an arm of the state because, inter alia, Florida statutory law extends immunity to all state agencies and requires appropriations to pay judgments against those agencies. See *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 948 F. Supp. 400, 411 (D.N.J. 1996). It would not be surprising if one response to *College Savings Bank* and *Florida Prepaid* in the future were a restriction on the circumstances in which 11th Amendment doctrine would allow states to shelter commercial enterprises with the states' constitutional immunity.

the federal government's argument) to activities states undertake that are not core sovereign functions,³⁶ would have afforded a far more sensible accommodation of historic traditions of immunity and established doctrines of national legislative power.

C. *Alden v. Maine*

Finally, in *Alden v. Maine*,³⁷ the Court held that the federal Constitution guaranteed states an immunity from suit by private persons in their own courts on federal causes of action. The Court reasoned that the Constitution contains an implicit, deep principle of state sovereign immunity, which does not derive from the Eleventh Amendment but of which the Eleventh Amendment is merely one expression. This immunity from suit without consent exists in the state courts and exists with respect to otherwise validly created federal causes of action.

1. Justice and Constitutional Interpretation

Under the Court's holdings in *Seminole Tribe* and *Alden*, the following injustice results: Alden, who was entitled to be paid at overtime rates for certain work he performed as a state probation officer, can

36 See Brief for the United States at 21, *College Sav. Bank* (No. 98-149) (limiting constructive waiver argument so as not to extend to "activities [the state] cannot realistically choose to abandon, such as the operation of a police force"). The proposed constraint would reinvigorate a concept close to the rejected "traditional state functions" concept developed in *National League of Cities v. Usery*, 426 U.S. 833 (1976) and rejected as unworkable in *San Antonio Metropolitan Transit Authority v. Garcia*, 469 U.S. 528 (1985). Some version of this concept is, however, likely to emerge from the current Court's federalism jurisprudence. See, e.g., *Printz v. United States*, 521 U.S. 898, 931-33 (1997) (suggesting a distinction between laws targeting states and laws having incidental effect on state activities, with the latter subject to review of various factors concerning whether it "excessively interfered" with state government functioning). Moreover, as both Deborah Merritt and I have argued, albeit on somewhat different grounds, the Constitution itself provides guidance on what the core functions are. See Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2246-55 (1998); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988). Were the United States government's theory adopted, for example, it would not be proper to treat the convening of a state legislature as a "constructive consent" to application of any and all federal statutory standards that might by terms apply. If the Court were to adhere to its full-blown version of state sovereign immunity, the theory of constructive consent as applied to states' commercial activities might become a workable and useful constitutional doctrine. But as set forth in Part III.D, *infra*, there may be better doctrinal alternatives than immunity to safeguard important constitutional interests in the continued constitutional role of the states.

37 119 S. Ct. 2240 (1999).

seek relief neither in federal court nor in state court for the State's violation of valid federal law, enacted for the benefit of all employees of workforces beyond a certain size. As the Court notes, there are some remedies available to enforce the still valid federal overtime pay obligations as against the states: If the state persists in its violations, Alden could obtain an injunction against state officers to restrain future violations; but the state is permitted to have violated his rights in the past without any effective remedy for the injured employee.³⁸ Such an unjust result—a refusal to provide to the injured individual a remedy for violation of a “vested legal right”³⁹—should not have been reached except under the strongest constitutional compulsion.

This is not to say that the Constitution must be read as justice requires; justice may not have much to say about the separation of powers, for instance, and even if an objection from concepts of justice and democracy could be made, for example, to the Senate, the text and history are clear. But when there are interpretive choices that are open under constitutional text, structure, history, and precedent,⁴⁰ the Court should generally choose the more just interpretation if it can discern what that is. Here the task of discernment was not difficult.

38 The Court also places weight on the fact that the United States can constitutionally bring an enforcement action, collect the past due amounts, and pay them over to Alden. See *Alden*, 119 S. Ct. at 2268. While the Court argued that this, together with the prospective injunction, will be adequate to secure the effective enforcement of federal law and implied that the failure of the United States to itself assert Alden's claim suggests its relative unimportance, the Court seems profoundly misguided here: For it is at once a protection of liberty, an integral part of the broader jurisprudence of Article III jurisdiction, and a feature of effective enforcement of laws designed to protect specific beneficiaries for those beneficiaries themselves—the actually injured individual parties—to be able to bring an action.

39 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162–63 (1803) (asserting that the protection of “vested legal rights” is in its nature judicial).

40 There can be no doubt that the Court had an “open” choice. Indeed, the Court devotes a lengthy section of its opinion to explaining why, despite cases like *Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197, 204–05 (1991) (holding that the state could be sued on a federal Jones Act claim in state court even though the suit was barred in federal court by the 11th Amendment), and *Nevada v. Hall*, 440 U.S. 410, 418–21 (1979) (rejecting the state's claim of immunity from suit in a sister state court because the 11th Amendment does not apply other than in federal court) the question of state sovereign immunity to federal claims in state court was still undecided. See *Alden*, 119 S. Ct. 2257–60 (concluding, after distinguishing these and other cases, that Congress's authority under Article I to abrogate state immunity from suit in its own court is “a question of first impression”).

2. Rule of Law and Supremacy of Federal Law

Alden's expansion of the states' constitutional immunity from suit beyond that established in prior cases poses threats to the rule of law—by which I here mean the degree of certainty that there will be effective, judicial enforcement of applicable legal norms. It bears remembering that the phrase “government of laws not men” arose in a case against a government official. The phrase has come to have at least two implications: that judges will decide cases according to law and not depending on the parties before them; and that the laws that generally apply will be enforceable against the government. Under *Alden*, the remedies that courts apply for violation of a large number of federal laws will vary depending on the identity of the defendant (and not the content of the law); and the remedies available against private entities will not be available against state governments.⁴¹

Additionally, *Alden* is in tension with one of the pillars of federal courts law, *Testa v. Katt*.⁴² I focus here only on *Testa's* conclusion that a state may not, in its courts, discriminate against hearing claims over which the state courts otherwise have “jurisdiction adequate and appropriate under established local law”⁴³ based upon the federal character of the law whose enforcement is sought. Here, Maine had waived its immunity to suit in the state courts on state law minimum wage claims against the State.⁴⁴ As I understood *Testa* before this case, it would then have been clear that, since Maine had waived its immunity for analogous claims in the state courts, the State was not free to discriminate against the federal claims by barring its courts from hearing them. But now, absent “evidence that the State has manipulated its immunity in a systemic fashion to discriminate against federal causes of action,” a state may limit its consent to suit to exclude cer-

41 It may be that this rule-of-law objection merges with the objection from justice. Immunity rules are more generally in some tension with “rule of law” ideas as applied to claims against governments and government officers, and I do not argue against all immunity doctrines. But I note this objection separately, for it is worth remembering the costs of immunity doctrines, as well as their justifications.

42 330 U.S. 386 (1947).

43 *Id.* at 394.

44 See *infra* notes 160, 162 (quoting at length from the government's brief in *Alden* and from the Court's response to that argument). Under Maine's minimum wage law, however, public employees were not entitled to increased pay for overtime (which was the subject of the federal FLSA claim). Maine argued that it was its ban on overtime pay that was most analogous to the federal claim and that, since the state courts did not hear state overtime claims against the state, its courts did not discriminate in refusing to hear the federal overtime claim. See Brief for Respondents at 8, *Alden* (No. 98-436).

tain claims based on federal law because doing so is "no more than [an] exercise [of] a privilege of sovereignty."⁴⁵

3. Devaluation of the Role of Courts in the System of Separation of Powers

As I argue elsewhere at greater length, the *Alden* opinion is more explicit than many in deprecating the value of judicial decisions concerning government behavior and judicial remedies for that behavior.⁴⁶ The Court essentially argues that judicial damages awards against the state are opposed to the ability of a people to self-govern.⁴⁷ Similar objections, however, apply to declaratory judgments or injunctive relief, which can also constrain legislative choices. The authority and obligation of courts to decide individual claims under national laws validly enacted for the benefit of the people derives from basic principles of the supremacy of federal law, to which the states agreed when they entered the Union. To suggest that judicial enforcement of laws made by the people's representatives is inconsistent with principles of self-government is fundamentally pernicious and disrespectful both to the role of courts and to the role of the people's representatives in the national legislature.

4. Pretense About Precedent

The logic of *Alden* is that the older precedents at best leave open whether states can assert sovereign immunity in their own courts against federal statutory claims and that the reasoning and result in *Seminole Tribe* require a similar rule in *Alden*.⁴⁸ *Seminole Tribe* held that the Eleventh Amendment precludes Congress from abrogating states' Eleventh Amendment immunity from suit in federal courts. The *Alden* Court, while agreeing that the Eleventh Amendment does not apply in state courts, nonetheless concludes that it would be constitutionally anomalous for state courts to be compelled to hear claims against states that federal courts could not hear. But the Court reaches this conclusion only by assuming that, from the point of view of state sovereignty, there is no significant difference between a fed-

45 *Alden*, 119 S. Ct. at 2268; see also *infra* text accompanying notes 160–61.

46 See Jackson, *supra* note 1.

47 See *Alden*, 119 S. Ct. at 2264.

48 See *id.* at 2255–60, 2266 ("We are aware of no constitutional precept that would admit of a congressional power to require state courts to entertain federal suits which are not within the judicial power of the United States . . ."). Note too that *Seminole Tribe* and the 11th Amendment are the first authorities cited in the Court's reasoning in *Alden*. See 119 S. Ct. at 2246–47.

eral and a state court entertaining an action against the state. And this assumption can only be sustained by ignoring a line of cases that proceed on the opposite assumption—that is, that it is more deferential to state sovereignty for state courts to hear and resolve federal claims against the states than for federal courts to do so.⁴⁹ Indeed, in the Term after *Seminole Tribe*, two members of the *Seminole Tribe* and *Alden* majorities, Justice Kennedy and Chief Justice Rehnquist, so argued to support their claim that if state courts were open, even *Ex parte Young* actions should not be permitted in federal court.⁵⁰ Only by pretending that these conflicting lines of authority had no bearing could the majority argue that precedent and history compelled the result it reached.⁵¹

49 See Jackson, *supra* note 1.

50 See *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 274 (1997) (Kennedy, J., joined by Rehnquist, C.J.).

51 The Court's fundamental argument—that sovereign immunity was an important constitutional principle, implicit in the original Constitution, and reflected (but not created) by the 11th Amendment—is inconsistent with older cases predating *Hans v. Louisiana*, 134 U.S. 1 (1890). For 19th century cases reflecting the assumption that federal courts could exercise jurisdiction over actions by diverse citizens against states until ratification of the 11th Amendment, see *United States v. Louisiana*, 123 U.S. 32, 35 (1887) (describing Article III's listings of heads of jurisdiction as "modified by the Eleventh Amendment"), *New Hampshire v. Louisiana*, 108 U.S. 76, 91 (1883) (holding that one state could not sue another on behalf of its citizens and reasoning that "[u]nder the Constitution, as it was originally construed, a citizen of one State could sue another State in the courts of the United States for himself," that there was thus "no necessity for power in his State to sue in his behalf," and that it was not "the intention of the framers of the Constitution to allow both remedies in such a case;" "the giving of the direct remedy to the citizen himself was equivalent to taking away any indirect remedy he might otherwise have claimed, through the intervention of his State, upon any principle of the law of nations. It follows that when the amendment took away the special remedy there was no other left"), *Briscoe v. Bank of Kentucky*, 36 U.S. (11 Pet.) 257, 285 (1837) (argument of counsel) (assuming that at the founding states could be sued by diverse citizens but not their own), *id.* at 327–28 (Thompson, J., concurring) (making same assumption), and *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 139 (1810) (Marshall, C.J.) (alluding to a difference between the Constitution as passed and after the 11th Amendment was ratified). See also *Hans*, 134 U.S. at 21 (1890) (Harlan, J., concurring) (disagreeing with the Court's implications that *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), had been incorrectly decided). On the Court's reasoning in *Seminole Tribe*, these older cases would be better evidence of correct readings of the Constitution than *Hans*. See *Seminole Tribe*, 517 U.S. at 69 (suggesting that *Hans's* analysis of the original understandings of the Constitution was superior to that of Justice Souter's dissent because the *Hans* Court was closer in time to original events).

D. *Scholarship and Stare Decisis*

Stare decisis plays an important and valuable role in constitutional adjudication. It provides a reason for courts to try to account to and for past decisions and thus reinforces both reason-giving and stability.⁵² But I do not believe that *Seminole Tribe*—which led to *Alden*'s expansive view of constitutional sovereign immunity in the state courts and has contributed to the Court's restrictive interpretations of the Fourteenth Amendment—is yet entitled to be treated as "stare decisis."

First, *Seminole Tribe* was clearly wrongly decided.⁵³ As argued above, moreover, *Alden* was incorrect, especially in light of *Seminole Tribe*,⁵⁴ and the *Florida Prepaid* cases contain grievous errors of consti-

52 But see, e.g., Jonathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 CHI-KENT L. REV. 93, 111 (1989) (suggesting that stare decisis "permits judges to free-ride" on earlier efforts by other judges and thus "avoid the extremely difficult task of constructing" law). In contrast to those who criticize stare decisis as encouraging a kind of judicial mindlessness, I see it instead as a doctrine that reinforces what I would call procedures for accountability in judicial decisionmaking.

53 For critical commentary on *Seminole Tribe*, see Vicki C. Jackson, *Seminole Tribe, the Eleventh Amendment and the Potential Evisceration of Ex parte Young*, 72 N.Y.U. L. REV. 495 (1997), Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, and Henry Paul Monaghan, *Comment: The Sovereign Immunity "Exception,"* 110 HARV. L. REV. 102, 121, 133 (1996) (suggesting that the Court "rejected clear constitutional text in preference to unarticulated and debatable historical explanations because of the power of symbolism, thus perpetuating a questionable doctrine"). For critique from a separation of powers point of view, see Laura S. Fitzgerald, *Beyond Marbury: Jurisdictional Self-Dealing in Seminole Tribe*, 52 VAND. L. REV. 407 (1999). Not all scholarship has been so disapproving. See, e.g., David P. Currie, *Ex parte Young after Seminole Tribe*, 72 N.Y.U. L. REV. 547 (1997); Richard H. Seamon, *The Sovereign Immunity of States in Their Own Courts*, 37 BRANDEIS L.J. 319 (1998); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997). Fortunately, *Seminole Tribe* has not deterred legal scholars from pursuing deeper historical understandings of the 11th Amendment. See James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269 (1998).

54 Query: If *Seminole Tribe* had been correctly decided (to uphold federal jurisdiction over federal statutory claims against states where Congress speaks clearly and has substantive legislative power), would state courts have to hear federal claims whose state law analogues are barred by state sovereign immunity? Absent discriminatory applications of state sovereign immunity law, must a state court entertain a federal cause of action against a state when the federal courts are open to it? One could read the Supremacy Clause to require this result, especially in light of the Madisonian Compromise which, as conventionally understood, does not require creation of inferior federal courts. But one might also reason that, so long as the availability of a federal forum permits holding governments accountable to law and vindicating the supremacy of federal law, the interests of states in controlling the jurisdiction of their own judiciaries would be stronger than any need to require a state court without juris-

tutional reasoning. A basic requisite for the inapplicability of stare decisis has to be that the prior decision was wrong—and not just wrong, but substantially wrong. This standard is met. Next, *Seminole Tribe* and its progeny have all been closely divided, 5-4 decisions. Third, *Seminole Tribe* and its progeny have had to overrule past decisions themselves. While the decisions they overruled—*Pennsylvania v. Union Gas*⁵⁵ and *Parden v. Terminal Railway*⁵⁶—were also 5-4 decisions, the inconsistencies in results are hallmarks of the kind of constitutional decisions that cannot yet be regarded as settled into the warp and woof of constitutional law. Finally, *Seminole Tribe* and its progeny are quite recent, and it is hard to see how—consistent with the demands of the Supremacy Clause—states could legitimately, given the Court's reasoning, rely on them to their detriment: The Court's theory is that the state's "good faith"⁵⁷ and the possibility of federal government suits to recover damages, plus injunction actions, will induce states to comply with federal law.⁵⁸ If the Court is not being disingenuous in arguing that there are ample means to assure state compli-

dition over analogous state law claims to hear federal claims against the state. Cf. *Martinez v. California*, 444 U.S. 277, 282 (1980) (balancing the "[s]tate's interest in fashioning its own rules of tort law" against the "discernible federal interest" in due process to uphold the constitutionality of state sovereign immunity bar to state wrongful death claim). Under those hypothetical circumstances, the federal system might be adequately protected through the discrimination prong of *Testa v. Katt*, 330 U.S. 386 (1947). In light of *Seminole Tribe*, however (and in light of Maine's waiver of immunity to state minimum wage claims), I believe that the decision in *Alden* is unsupportable.

As a matter of the policies of judicial federalism, much can be said in favor of any of three regimes: (1) a regime that permits federal courts, but does not require state courts, to hear claims against their states; (2) a regime that forbids federal courts, but requires state courts, to hear such claims; and (3) a regime that both permits federal courts and requires state courts to hear such claims. For a brief discussion, see Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment and State Sovereign Immunity*, 98 YALE L.J. 1, 73-74, 86-88 & nn.347, 349 (1988) (discussing the idea of complementarity of jurisdiction). What is insupportable, however, is the regime we presently have, in which federal courts are prohibited to hear such claims and state courts are free to deny jurisdiction as well. For a related discussion, see Meltzer, *supra* note 12, at 1035-37.

⁵⁵ 481 U.S. 1 (1989).

⁵⁶ 377 U.S. 184 (1964).

⁵⁷ *Alden*, 119 S. Ct. at 2266; see also *Florida Prepaid*, 119 S. Ct. at 2209 n.9 (implying that the possibility of a private bill from the legislature was relevant to the due process analysis).

⁵⁸ See *Alden*, 119 S. Ct. at 2266-68.

ance with federal law,⁵⁹ then what legitimate "reliance" interest would states have in the ruling?⁶⁰

The Supreme Court has spoken, and the lower courts are clearly bound by its current interpretation of the Eleventh Amendment, sovereign immunity under the Constitution, and the Fourteenth Amendment. But members of the Court, and scholars who comment on its decisions, have a choice to make. When a line of decisions is this wrong, this recent, and this closely divided, scholars who believe the decision is wrong should call for its reversal, and Justices who believe it is wrong are justified in so insisting in subsequent decisions.⁶¹ The role of scholars, here, is of some potential importance. Notwithstanding the Court's occasionally expressed disdain for the value of scholarly comment,⁶² in evaluating whether a case has become a basic part of the legal landscape for purposes of deciding the stare decisis value it should be accorded, the views of the legal community—including the views of scholars—should be of some weight.⁶³ Scholarship often has as its function the rationalization of the Court's decisions, an ef-

59 Cf. Meltzer, *supra* note 12, at 1023 (noting tension between the Court's arguments that federal enforcement will not suffer and that private suits are particularly intrusive).

60 Cf. *Payne v. Tennessee*, 501 U.S. 808, 828–30 (1991) (arguing that stare decisis should play a smaller role where issues are ones of procedure). Presumably the Court assumes that primary conduct is less likely to be influenced by such considerations. Under the other *Payne* factors advanced by Chief Justice Rehnquist, neither *Seminole Tribe* nor *Alden* should yet be given stare decisis effect, considering the amount of controversy within the Court and the closeness of all these decisions "over spirited dissents challenging the basic underpinnings of those decisions." *Id.* at 829.

61 I advanced this argument in 1997, see Jackson, *supra* note 53, at 544–45 & n.177, and again on January 8, 2000, at the AALS Federal Courts panel. Three days later the Court issued its decision in *Kimel v. Florida Board of Regents*, 120 S. Ct. 631 (2000). Justice Stevens, writing for four dissenters, asserted that it would be wrong to accord stare decisis effect to *Seminole Tribe* and its progeny. See *id.* at 653. I agree with the dissenters.

62 See, e.g., *Seminole Tribe*, 517 U.S. at 68 (noting that Justice Souter's dissent was "cobbled together" from nothing more than law journal articles).

63 See Ruth Bader Ginsburg, *Informing the Public About the U.S. Supreme Court's Work*, 29 LOY. U. CHI. L.J. 275, 283 (1998) (asserting that most judges read "legal commentaries and law reviews" for "enlightenment on decisions, past, present and future"); see also Learned Hand, *Have the Bench and Bar Anything to Contribute to the Teaching of Law?*, 24 MICH. L. REV. 466, 480 (1926) (arguing that law teacher and judge are "necessary to the other [and that] each must understand, respect and regard the other, or both will fail"); cf. MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS: TEXT, MATERIALS AND CASES* 209 (2d ed. 1994) (describing the role of legal scholarship as a form of doctrinal authority in civil law systems and noting that "learned writing" exerts most influence where the law is unsettled and where learned writing is in consensus, sometimes even prompting abandonment of prior decisions).

fort to identify its theory, and determine what, as a matter of coherence, will follow, with the implicit normative goal of supporting and helping to construct coherence.⁶⁴ It is my plea here that those scholars whose independent judgment on the underlying merits is that the Court is wrong not yet turn to the rationalizing phase of our work, but resist, and condemn, in the hope of developing a more just and more constitutionally justifiable basic framework.

II. OF HISTORY, FORUMS, OLD AND NEW PROPERTY, AND REMEDIAL HIERARCHY: SOME COMMENTS ON PROFESSORS VÁZQUEZ'S AND WOOLHANDLER'S ARTICLES

It is common ground for Professors Vázquez and Woolhandler that the Court is engaged in an effort to find the proper balance between competing constitutional aspirations—to recognize the sovereign immunity of the states, on the one hand, and to afford appropriate remedies to secure governmental accountability, on the other. Their articles also find common ground in the perceived relationship between individual government official liability traditions and the developing shape of state sovereign immunity law. Woolhandler argues that the Court's apparent exceptions—for takings of property and for refund of taxes (as to which the Court has held that due process requires a remedy)—to the general rule of sovereign immunity for states correspond to an "individual liability" model. In this sense, she and Vázquez are quite close in reading the Court's due process cases requiring states to provide taxpayer refunds (as a matter

64 Professor Vázquez's work can be seen to raise a tension between coherence and justice as constitutional aspirations. See Vázquez, *supra* note 22, at 1692, 1777–90 (arguing that jurisprudence on due process, sovereign immunity, and the 11th Amendment can be rendered coherent by understanding that constitutionally required remedies are against individuals, be those *Ex parte Young* actions or damages actions, and that states have choices whether to indemnify or substitute themselves as parties for the officers). In that piece, he advances interpretations of the Court's decisions to make more "coherent" the *Seminole Tribe* and *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), decisions, one being that states possess a constitutional immunity from suit but that the Constitution requires that remedies be available against state officers, possibly without regard to official immunities. See Vázquez, *supra* note 22, at 1805. I would agree that if individual liability of state officials were expanded and the protections of the "clearly established" law rule loosened, rule of law concerns raised by expansions of immunity would be mitigated, and greater coherence in formal doctrine might be obtainable. But the likelihood of Congress, or the Court, insisting on such strict personal liability seems remote; and adoption of the immunity justifying theory may simply result in an overall contraction of the availability of individual redress to victims of government wrongdoing. For further discussion, see *infra* text accompanying notes 115–23.

of due process) as implying an individual officer liability model. Woolhandler treats the Court's decisions as perhaps implicitly assuming this,⁶⁵ and Vázquez treats the Court as perhaps unaware of the tensions in its due process and sovereign immunity doctrines.⁶⁶ But in the end, both seek to rationalize the Court's apparently clear holdings that *states* must provide those remedies as resulting from or leading to a model of individual liability, with the state having the power voluntarily to substitute itself as the remediator in a scheme of long-standing protection of property interests.

Woolhandler's approach is largely historical: she claims that it is consistent with history—in the sense of judicial precedents—to treat states as being immune from suit for damages on “new property” claims, and she claims that by and large the Court's new jurisprudence is consistent with this history and is justified by a set of characteristics that distinguish new and old property claims that support following the historical model.⁶⁷ While I agree that nineteenth-century precedents support the view that sovereign immunity of state and federal governments is a part of the remedial tradition, that tradition does not fully answer the question of the constitutionality of congressional abrogation of immunity on federal causes of action. I also disagree with her argument that the Court's approach conforms to distinctions between new and old property and with her normative defense of distinguishing between new and old property for purposes of sovereign immunity doctrine. Instead, I will suggest, Woolhandler's normative arguments would support recognition of only limited forms of monetary relief in actions against sovereign governments and would justify constitutional doctrine protecting constitutional sovereigns from unlimited exposures to all of the elements of damages recovery that may exist in ordinary tort actions, but they do not support what the Court has found—that is, a constitutionally prescribed immunity from suit.

Vázquez's approach, by contrast, is grounded less in the values of historical practices and more in the value of coherence in constitutional interpretation. His description of the logical implications of the Court's developing positions in its sovereign immunity and Eleventh Amendment case law is analytically very helpful, as is his rule-of-

65 See Woolhandler, *supra* note 8, at 920 (noting that the “Court has stuck close to an individual liability model even when it has permitted abrogation of state immunity”).

66 See Carlos Manuel Vázquez, *Sovereign Immunity, Due Process, and the Alden Trilogy*, 109 YALE L.J. (forthcoming June 2000); see also Vázquez, *supra* note 7 at 860–61.

67 See Woolhandler, *supra* note 8, at 932–51.

law critique of the complexity of the current doctrine.⁶⁸ But his speculation that the Court may be moving towards a position in which abrogation under the Fourteenth Amendment is never possible is less convincing,⁶⁹ and I will question how we should understand the language on which Vázquez relies in speculating to this effect. I also question his argument that the scope of officers' immunities (i.e., qualified immunity) should be "constitutionalized" and attribute some of its apparent appeal to the allure of coherence with decisions (including *Seminole Tribe* and *Alden*) that I think are fundamentally wrong. On his concerns for coherence in the law (which I in some measure share), I have argued above that as scholars we should not necessarily value coherence over justice and must therefore be concerned with the question of what understandings of the Constitution—among those that are supportable by conventional methods of understanding—will best advance justice, as well as other constitutional values.

A. *History, Forum Allocation, and Remedial Preferences*

Professor Woolhandler argues that the Court has properly rejected the "forum allocation" view of the Eleventh Amendment, that as a descriptive matter the Court's sovereign immunity cases draw a distinction between old property and new property for remedial purposes, and that as a normative matter this makes sense. While I agree that the Court has rejected the forum allocation view, the Court's emphasis on the availability of state court remedies as limiting Congress's Section 5 powers could end up having some of that effect, as Professor Vázquez's article suggests. Moreover, whether a "forum allocation" view is or is not supported by history depends in some part on whether one focuses on the nineteenth or twentieth-century cases. As to the coherence and legitimacy of the distinctions between those cases in which Congress, or the Court, can require states themselves to provide monetary remedies and those in which it cannot, I am unpersuaded that the Court's current doctrine is coherent with history or that it is normatively justified by the factors Woolhandler propounds. I question the constitutional theory of interpretation by which Woolhandler proceeds, resting as it does almost entirely on historic practices; I find that as a descriptive matter the historic justification of the Court's current distinctions in remedies is incomplete, and on the normative front, Woolhandler's concerns about protecting states from

68 See Vázquez, *supra* note 66.

69 See Vázquez, *supra* note 7, at 893–900.

difficult-to-predict damages awards would support more narrow remedial limitations than those currently in place.

1. History and Constitutional Interpretation

A key question is why we should assume that the system of remedies extent in the nineteenth century defines what we should understand the Constitution to require, or to prohibit, by way of remedies against states. Assuming that at the time of the framing remedies were clearly established for unconstitutional takings and for improper taxation, and for little else, why should this provide the guiding principle for today determining what counts as "property" and what process is due?⁷⁰ Further, even if one concluded that as a general matter, original understandings should be the principal guide to interpretation, other features of the legal framework may have so dramatically changed that it becomes unconvincing to rely entirely on originalist approaches to resolve the remedial issues addressed in recent cases. Those changes include (i) expanded understandings of the constitutional powers of the national government (to include, for example, the power to require states to "pre-clear" changes in voting procedures and the power to impose minimum wage laws on state employees); (ii) expansion of the policies of both levels of governments to include a range of activities that compete with activities in the market, as is illustrated by the facts in the *Florida Prepaid* cases; (iii) expansion of the immunities from retroactive relief available to government officers from common law origins of strict liability to current notions of highly constrained possibilities for individual recovery against government officers;⁷¹ and (iv) limitations on the availability of injunctive

70 Professor Woolhandler's analysis does not explicitly distinguish between cases decided before and after the ratification of the 14th Amendment; yet one might think that if the courts were faithfully interpreting that Amendment, one would see some difference in the pre and post-ratification cases that would be relevant.

71 Both Vázquez and Woolhandler downplay the importance of "good faith" or qualified immunity defenses in their modern form in evaluating the role of history. In its modern form the "qualified immunity" defense allows bad faith behavior to be immunized that, under older formulations apparently would not have been. Compare *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804) (holding that a ship captain was liable for damages in carrying out a presidential order that exceeded statutory authorization even though the ship captain acted in good faith), with *Mitchell v. Forsyth*, 472 U.S. 511 (1985) (ruling that although an Attorney General did not have authority to authorize the conduct of warrantless search, he was immune from damages because his lack of authority was not "clearly established"), and *Anderson v. Creighton*, 483 U.S. 635 (1987) (holding that although the right to be free from warrantless searches absent exigent circumstances and probable cause was clearly established, the relevant question for immunity of police officer sued for warrantless search was whether in

relief against government officers.⁷² Many years ago Professor Jaffe's historic study of sovereign immunity in England concluded that the doctrine functioned less as an immunity and more as a way of defining the procedures by which remedies could be had.⁷³ If that is historically correct, then surely changes in the availability of other remedies for official wrongdoing should bear on the continued relevance of historic forms of sovereign immunity.

Having said that, however, let me also agree with Professor Woolhandler that, in the construction of the jurisdiction of the federal courts, history and tradition do have a significant role to play. It is history alone that can account for some significant departures from coherent, principled decisionmaking.⁷⁴ As the work of Professors Woolhandler, Fallon, Strauss, and others might be taken to suggest, maintenance of historical tensions in doctrine can be justified in part because of the stability that adherence to historical understandings promotes and in part because the Constitution consists of competing aspirations that will inevitably have to be compromised in part in order to be sustained at the same time as their competitors (and history is one plausible way to reach such a balance).⁷⁵

Yet, to assume history is the sole guide on questions of how sovereign immunity affects Congress's power to create causes of action enforceable against states is to ignore the lessons of history itself. One of the cases highlighted in Professor Woolhandler's superb historical ac-

light of particular facts a reasonable officer could have believed the search to be constitutional) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982)). And while the Court's modern reformulation of the doctrine of official immunities might be understood to be aimed at maximizing appropriate levels of deterrence, *see Vázquez, supra* note 7, at 877-79, neither Vázquez nor Woolhandler considers whether the doctrine is so inadequate in providing compensation or vindication of plaintiffs' interests that it fails to fulfill the goals of a remedial system (with consequent adverse effects on citizens' trust of their government).

⁷² Compare *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (holding that a person who had been subject to a choke hold lacked standing to seek an injunction against future use of choke holds by the police), with *Allee v. Medrano*, 416 U.S. 802 (1974) (affirming the grant of an injunction against certain abusive police practices).

⁷³ See Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963).

⁷⁴ See, e.g., *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 68 n.20 (1982) (plurality) (Brennan, J.) (stating that the rationale for public rights cases lies "not in political theory, but rather in Congress's and the Court's understanding of what power was reserved to the Judiciary by the Constitution as a matter of historical fact").

⁷⁵ See Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996); Woolhandler, *supra* note 8, at 919.

count of constitutionally compelled remedies, *Burrill v. Locomobile Co.*,⁷⁶ includes this assertion by Justice Holmes, writing for the Court:

The Constitution standing alone without more does not create a paramount unchangeable liability to an action of tort on the part of all persons who may take part in enforcing a state law that it invalidates. It leaves the remedies to Congress and the States.⁷⁷

In evaluating what remedies Congress can impose, then, at least one important voice in history insists on a substantial role for Congress.

2. What Does History Show?

My second point follows from this discussion: the historical record is in fact more ambiguous than Woolhandler's treatment in this Article allows. Let me consider first the argument concerning the "forum allocation" view of the Amendment.

a. Forum Allocation?

Alden plainly rejects a view of state sovereign immunity as constitutionally protected by understanding the Eleventh Amendment as having a "forum allocation" function, under which cases barred from being initiated in federal court would be adjudicated in state court and subject to Supreme Court review. Under *Alden*, it is up to the states, rather than to federal law, whether the state courts must entertain such actions. To the extent that the standards for waiver of immunity to suit in state courts are less stringent than for waiver in federal courts, the Eleventh Amendment will still function in some respects as a forum allocation principle—what I shall refer to as the "weak" forum allocation principle. But the claim that state courts must hear cases against states arising under otherwise valid federal law has, for the time, been rejected.

Woolhandler's argument—that the strong version of the forum allocation view, which would treat states as obligated to hear cases barred from federal courts by the Eleventh Amendment, is historically insupportable—is incomplete in the sources on which it draws and thus reaches a conclusion that is not fully persuasive. It is, I think, correct to point out—as Woolhandler has so well shown⁷⁸—that the nineteenth-century cases seemed to treat immunity issues in cases in-

⁷⁶ 258 U.S. 34 (1922). *Burrill* is discussed in Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 138–44 (1997).

⁷⁷ *Burrill*, 258 U.S. at 38.

⁷⁸ See Woolhandler, *supra* note 8, at 921–24; see also Woolhandler, *supra* note 76, at 148–62.

volving federal questions with some degree of similarity whether the case arose initially in the state or the federal courts. Indeed, *Cohens v. Virginia*,⁷⁹ a case frequently cited for the proposition that the Eleventh Amendment does not apply on appeals from state court decisions, rests far more clearly on two other propositions: first, that in its essential posture the case was not one against a state but by a state against private persons as criminal defendants and, in that posture, did not come within the bar of the Amendment; and second, that federal question jurisdiction was invoked (by a citizen against his own state) rather than a party-based head of jurisdiction.⁸⁰

But, it does not follow from this nineteenth-century practice that the subsequent development of the "forum allocation" view of the Eleventh Amendment's effect, which was manifested in the Court's more recent decisions until *Alden*,⁸¹ is unsupported by history. Rather it depends on what counts as history. For by 1900, the Court had introduced the concept that a state could be subject to suit in its own courts, on federal claims, even when it was not subject to suit in the federal courts.⁸² This issue initially arose in the context of waivers of immunity, the Court holding that waivers of immunity to be sued in state courts would not ipso facto extend to being sued in federal court. Yet the Court at the same time made clear that the state could not condition its consent to being sued in state courts so as to preclude Supreme Court review of its decision of federal issues.⁸³

Woolhandler suggests that this federal limitation on the state's power to limit its consent can be understood by reference to the need to have the Supreme Court resolve federal issues that are decided in

79 19 U.S. (6 Wheat.) 264 (1821). For a detailed discussion, see Jackson, *supra* note 54, at 13–25.

80 That sovereign immunity issues were treated similarly by the Court in both state and federal court cases involving federal claims, as Woolhandler suggests, would not be inconsistent with the "diversity repeal" view of the 11th Amendment that I and others have argued for. If sovereign immunity is recognized as a common law doctrine, it would not be surprising at all that federal and state courts in the 19th century would come to similar conclusions. And if the 11th Amendment were understood to repeal heads of jurisdiction based on party status, it would be irrelevant to Congress's powers to abrogate common law immunities to vindicate federal law in federal question cases. See Jackson, *supra* note 53, at 39–104; see also *Seminole Tribe*, 517 U.S. at 130–59 (Souter, J., dissenting); *id.* at 82–95 (Stevens, J., dissenting).

81 See *Hilton v. South Carolina Pub. Ry. Comm'n*, 502 U.S. 197 (1991); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238–39 n.2 (1985); see also *Nevada v. Hall*, 440 U.S. 410 (1979).

82 See *Smith v. Reeves*, 178 U.S. 436 (1900).

83 See *id.* at 445.

the state courts.⁸⁴ This is not a sufficient explanation, for we tolerate state courts deciding a variety of federal issues that cannot (because of the presence of an independent and adequate state ground) be reviewed in the Supreme Court.⁸⁵ Rather, as I have suggested at greater length elsewhere, the constructive, conclusive "consent" to Supreme Court review of state court judgments in actions against states arises from the Constitution itself and from the states' agreement to that Constitution.⁸⁶ And if the Constitution itself requires Supreme Court review of state court judgments against states when federal law is involved, it surely provides some basis for the view that the Constitution equally contemplates lower federal court jurisdiction over states in litigation involving federal questions.

To the extent that Woolhandler's position implies that it would make no difference to states whether they were sued in state or federal court, moreover, the position is inconsistent with another important strand of federal courts law. Concomitant with the expansion of federal court jurisdiction over federal question cases that began in earnest after 1875, the Court developed doctrines of abstention, designed to secure the role of state court systems in adjudicating cases of interest to the states in their sovereign governmental capacities and in preserving of the integrity of state judicial systems.⁸⁷ Many of these doctrines are predicated on the assumption that states have special interests in adjudicating in their own courts claims close to the heart of state sovereignty, including tax claims. As recently as 1997, Justice Kennedy, joined by Chief Justice Rehnquist, argued that there was a significant difference, from a constitutional perspective, between a state court entertaining an action in essence against the state and the same action proceeding in federal court. While they advanced the argument in *Idaho v. Coeur d'Alene Tribe*,⁸⁸ they have withdrawn it in *Alden*—but this does not make it any the less consistent with a strand of history in both sovereign immunity and other abstention cases.

Nonetheless, Woolhandler is correct in describing the Court as rejecting the "forum allocation" view of the Amendment. As Professor

84 See Woolhandler, *supra* note 8, at 924.

85 See, e.g., *Michigan v. Long*, 463 U.S. 1032, 1041 (1983); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935).

86 See Jackson, *supra* note 54, at 36–37.

87 See generally RICHARD H. FALLON, JR. ET AL., *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1216–22, 1230–1308 (4th ed. 1996) (describing, e.g., "Younger" abstention, Pullman abstention, Burford abstention, and the case law relating to Tax Injunction Act).

88 521 U.S. 261, 271–74 (1997) (Kennedy, J., joined by Rehnquist, C.J.). See generally *supra* text accompanying notes 48–51.

Vázquez suggests, however, to the extent that Congress's powers to abrogate states' immunities from suit are dependent on whether state court remedies are provided, the functional effects of the "forum allocation" view may well be reinforced.⁸⁹ Alden also raises for the future the question whether, where Congress has power constitutionally to abrogate states' Eleventh Amendment immunity in federal court, it likewise has power to abrogate states' constitutional immunity in state court. Whether the concerns that underlay the "forum allocation" function of Eleventh Amendment jurisprudence will be invoked in examining that question may depend on how fully the Court has abandoned the anti-discrimination principle of *Testa v. Katt*,⁹⁰ discussed in Part III.

b. Old and New Property, History, and Sovereign Immunity

Professor Woolhandler is, I think, persuasive in showing stronger nineteenth-century traditions for assuring federally enforceable judicial remedies for unconstitutional takings and for coerced taxes through remedies against state officers than for affirmative enforcement of state contracts; historically, as she suggests, some of the mechanisms at common law for redress of takings or coerced taxes involved analogies to actions against individual officers in trespass.⁹¹ But how this bears on Congress's authority to treat invocation of sovereign immunity as a denial of due process remains unclear.⁹² Many of the nineteenth-century cases on which Woolhandler relies to support her

89 See Vázquez, *supra* note 66.

90 330 U.S. 386 (1947).

91 See Woolhandler, *supra* note 8, at 921–29; Woolhandler, *supra* note 76, at 99–110, 135–37; see also Vázquez, *supra* note 22, at 1774–76 (emphasizing remedial trends based on relief against state officers, though minimizing purported distinction between contract and tort). I am not yet persuaded by the argument that the Due Process Clause of the 14th Amendment could always be satisfied with relief against officers. The 14th Amendment is, after all, addressed to the state itself; and the Due Process Clause itself might well impose limits on the degree to which state law could assign to its officers the financial responsibility of providing redress for harms caused by a policy insisted on by the state itself.

92 Woolhandler appears to frame her discussion as follows: Given the Court's ruling in *Seminole Tribe*, it is sensible for the Court to interpret the 14th Amendment in a way that does not permit Congress simply to exercise the power to enforce the Due Process Clause as a basis for enforcing Article I rights against the states; to do otherwise would be to allow circumvention of the rule of *Seminole Tribe*. Professor Woolhandler's argument, which others make as well, makes assumptions about the limited breadth of the 14th Amendment that I believe should not pass unnoticed or unchallenged—history may teach that the 14th Amendment, and especially the Privileges and Immunities Clause, was indeed intended to have a substantial nationalizing effect.

claim for a constitutional basis for sovereign immunity were cases that must be understood in the context of a world in which the sharp distinctions between federal and state law that characterize the modern consciousness had not emerged.⁹³ While sovereign immunity was spoken of as part of the jurisprudence of civilized nations then,⁹⁴ so too was the federal government's authority to exclude from citizenship Chinese persons on account of their race in post-Fourteenth Amendment decisions that the Court would not likely reach today.⁹⁵ Earlier cases, from the Marshall Court era, gave far more cautious interpretations both to the scope of the Eleventh Amendment and to the reach

93 As Woolhandler herself recognizes, the boundaries between state and federal law were far less clearly articulated in older cases than today. See Woolhandler, *supra* note 76, at 108–11.

94 See, e.g., *Beers v. Arkansas*, 61 U.S. (20 How.) 527 (1857). The Court there said,

It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another State. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it.

Id. at 529. Note that *Beers's* description of sovereign immunity departs substantially from what the modern Court has said about the sovereign immunity of the states: First, states do not possess sovereign immunity with respect to claims by other states or by the United States. Second, they may not prescribe the terms and conditions entirely, since they cannot preclude Supreme Court review of cases heard in the state courts. For Woolhandler's treatment of *Beers*, see Woolhandler, *supra* note 8, at 925 n.35, and Woolhandler, *supra* note 76, at 114 n.185.

95 See *Fong Yue Ting v. United States*, 149 U.S. 698, 700 n.1 (1893) (upholding a statute requiring the exclusion of persons of Chinese descent and requiring testimony of "at least one credible white witness" to establish proof of entitlement of Chinese laborers to remain in the country). The majority of the Court asserted the "inherent and inalienable right of every sovereign and independent nation" in support of its conclusion. *Id.* at 711. Justices Brewer and Field argued in vigorous dissents that the practice of other nations or claims about inherent rights of sovereignty were irrelevant to the powers of this government under the Constitution. See *id.* at 737 (Brewer, J., dissenting); *id.* at 757 (Field, J., dissenting). Whatever power the federal government today would or would not have to discriminate based on race in immigration and naturalization policy, it surely would lack power to discriminate based on race among those whose testimony could be heard on disputed questions of fact. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (holding that any use of race must meet compelling interest standard).

of sovereign immunity.⁹⁶ In *United States v. Lee*,⁹⁷ the Court noted the absence of any persuasive constitutional justification for the doctrine of sovereign immunity as applied to the federal government, though it recognized its existence and gave it a narrow construction. As *Lee* and other cases suggest, the nineteenth-century history far more strongly supports a view of sovereign immunity as preventing suits directly to recover contractual damages from or compel specific performance of contracts by states than it does the current rule that any suit against a state officer for retrospective relief is deemed one against the state and generally barred by immunity.⁹⁸

Recognizing that the nineteenth-century cases suggest that sovereign immunity was a vibrant rule at least in considering affirmative claims on contracts against states, I differ from Woolhandler in seeing how this history relates to the distinction between new and old property. She argues that the Court's recent trilogy drew the correct line between old property and new property, indicating that, with respect to old property, monetary remedies must be provided either against the state or against its officers, but that for new property, it is appro-

96 See, e.g., *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821).

97 106 U.S. 196, 204–08 (1882) (noting that “the principle [of sovereign immunity] has never been discussed or the reasons for it given, but it has always been treated as an established doctrine”).

98 On the Court's willingness to sustain sovereign immunity defenses on contracts claims, see for example, *Hans v. Louisiana*, 134 U.S. 1 (1890) (holding suit against state to recover amounts due on bonds barred by the 11th Amendment), *In re Ayers*, 123 U.S. 443 (1887) (holding suit against a state Attorney General to “compel the specific performance” of bond contracts barred by 11th Amendment). For contrasting approaches to other kinds of claims against sovereign government officers, compare *Atchison Topeka & Santa Fe Railway v. O'Connor*, 223 U.S. 280 (1912) (permitting suit against a state tax collector to recover taxes claimed to violate the Commerce Clause which, according to state law, would be paid through a state auditor's “warrant for refunding of the tax”), *Poindexter v. Greenhow*, 114 U.S. 270 (1885) (permitting suit against a state officer to recover property seized for failure to pay taxes when the state's insistence on payment of taxes in a particular way itself violated the Contracts Clause), and *United States v. Lee*, 106 U.S. 196 (1882) (rejecting sovereign immunity defense in suit against federal army officers to eject them from land purportedly owned by the plaintiff), with *Breard v. Greene*, 523 U.S. 371 (1998) (relying on the 11th Amendment as an additional bar to federal jurisdiction over suit against a state officer to restrain execution of foreign national following arrest in violation of Treaty and subsequent conviction and death sentence), *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997) (holding that the 11th Amendment barred suit against state officers to prohibit their use of submerged river beds in violation of tribe's claimed federal right of ownership), and *Edelman v. Jordan*, 415 U.S. 651 (1974) (holding that the 11th Amendment barred suit against a state officer to recover past due welfare benefits under federal spending program).

priate to provide no or fewer remedies.⁹⁹ But her argument that a distinction between old and new property explains the cases is simply not persuasive on its own terms. Nor are her normative arguments persuasive in establishing the difference between new and old property as corresponding to justifications for when sovereign immunity will or will not apply.

Professor Woolhandler seeks to support what she sees as the Court's distinguishing between new and old property. But I do not understand why Woolhandler treats patents as a form of "old property" and Lanham Act unfair competition claims as "new."¹⁰⁰ Both are claims to protect interests whose existence depends on positive government acts or statutes. To be entitled to a patent, one must affirmatively establish one's entitlement, through proof of originality, usefulness, non-obviousness, and priority in time.¹⁰¹ A patent, in other words, is a form of property entitlement that is statutory in origin, not derivable from the interests protected by the common law absent a statute.¹⁰² The distinctions Woolhandler relies on, in short, are distinctions in the historic types of remedies available for different causes of action that do not necessarily correspond to the distinctions between "new" property and "old" property.

99 See Woolhandler, *supra* note 8, at 921, 932–33, 940–42 (treating the Court as distinguishing statutory from constitutional violations and as providing damages remedies for old but not new property). As Professor Vázquez argues, the Court did not purport to be distinguishing between new and old property. In *College Savings Bank* it said that the interests protected by the Lanham Act were not property at all. See Vázquez, *supra* note 66. It is unclear whether Professor Woolhandler's position is that this holding was correct, and accordingly due process requires no remedy at all to protect those interests, or whether her position is that what the Court should have said is that the Lanham Act interests are a form of "new property" with respect to which the Due Process Clauses should be understood to require fewer remedies (e.g., only prospective relief). (Note too, that even for old property, Professor Woolhandler's reading is that the Constitution does not really require remedies against the state but is satisfied with remedies against officers. See Woolhandler, *supra* note 8, at 929–32; see also Woolhandler, *supra* note 76, at 125 & n.244.) The Court has indicated that prospective injunctive relief against state officers to enforce federal law is generally still available. See, e.g., *Seminole Tribe*, 517 U.S. at 71 n.14. I am unsure whether Professor Woolhandler would see this as resulting from the Supremacy Clause or the Due Process Clause.

100 See generally Vázquez, *supra* note 22, at 1748 n.289 (arguing that efforts to distinguish Lanham Act claims from interests recognized as "property" is unpersuasive); Vázquez, *supra* note 66 (elaborating on this argument). For Professor Woolhandler's argument, see *supra* note 8, at 940–42.

101 See 35 U.S.C. §§ 101–03 (1994). See generally ERNEST BAINBRIDGE LIPSCOMB III, LIPSCOMB'S WALKER ON PATENTS (3d ed. 1991).

102 See *id.* at 35.

If one is to resort to history, moreover, consider the degree to which the older cases Woolhandler has identified might well have supported a different result in modern Eleventh Amendment cases like *Edelman v. Jordan*. The older cases, for one thing, do sometimes turn on small matters of pleading. For example, in *Atchison, Topeka & Santa Fe Railway v. O'Connor*,¹⁰³ discussed by Professor Woolhandler,¹⁰⁴ the Court upheld federal court jurisdiction over an action against a state tax collector to recover a tax claimed to violate the Commerce Clause, rejecting the defendant's challenge that the form of action was not permitted under state law. In considering this objection, the Court noted that whether the defendant, the Colorado Secretary of State, had paid the money over to the state treasurer would not affect jurisdiction, it being "inconceivable that the State should attempt to hold him" and noting that state law "provided against any difficulty in which the Secretary of State otherwise might find himself in case of a disputed tax," for it authorized the state auditor to "draw a warrant for the refunding of the tax" in the event of a judgment against the Secretary of State.¹⁰⁵ If it were the case that, except for claims based on a state contract, retroactive relief for governmental wrongs could be granted against state officers, regardless of whether payment would come from the state treasury or from property in the hands of the state, "sovereign immunity" would be of far less concern; judgment could have been entered against the state officer in *Edelman*. In cases subsequent to *O'Connor*, however, virtually identical actions were found barred in the federal courts by state sovereign immunity, and *O'Connor* was recharacterized as involving an action under "general law" against the tax collector "personally."¹⁰⁶ This twentieth-century expansion of the scope of sovereign immunity, as

103 223 U.S. 280 (1912).

104 See Woolhandler, *supra* note 76, at 136-37 & n.300; Woolhandler, *supra* note 8, at 925-26.

105 *O'Connor*, 223 U.S. at 287.

106 Great N. Life Ins. Co. v. Read, 322 U.S. 47, 50 (1944) (distinguishing *Smith v. Reeves*, 178 U.S. 436, from *O'Connor* on grounds that *Smith* was instituted "against the defendant 'as Treasurer of the State of California' to recover taxes assessed against and paid," pursuant to a state statute that authorized "suit against the State Treasurer for the recovery of taxes which were illegally exacted," while *O'Connor* was a suit "to recover personally from a tax collector money wrongfully exacted by him under color of state law"). But like the state statute described in *O'Connor*, the California law, described in *Smith*, provided that "[i]f the final judgment was against the Treasurer, the Comptroller of the state was directed to draw his warrant on state funds for its satisfaction." *Id.* at 50. What was different, apparently, was the caption—whether the defendant was sued "as Treasurer." Cf. *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824) (party of record rule). But cf. David P. Currie, *Sovereign Immunity*

noted above, illustrates the fluidity of "historical" understandings of what remedies are constitutionally required, casting doubt on the reliability and utility of Woolhandler's descriptive claim about what history establishes.¹⁰⁷

3. Normative Arguments About Remedies

Woolhandler's normative arguments proceed from the assumption that "new" property claims are more likely than "old" property claims to involve the potential for large and difficult to predict damages awards unrelated to any benefit the state may have achieved through its unlawful conduct. But the archetypal modern case prohibiting retroactive relief against state officials involves a factual scenario far afield from her concerns about unlimited damages unrelated to the scope and nature of the state's violation of law and possible benefits to the state from the violation. In *Edelman v. Jordan*,¹⁰⁸ the Court held as a matter of Eleventh Amendment law (and in the absence of waiver of immunity through "clear statement") that if a state official is sued for payment of funds due a social welfare recipient under a federal spending program, the state's immunity bars the suit against the officer—even though the state received the federal grant subject to the conditions of the grant, including payment of the assertedly past due amounts.¹⁰⁹ If a state has received federal funds to carry out a federal program and fails to pay third party beneficiaries that to which they are entitled, should this be regarded as analogous to unjust enrichment? Moreover, as Woolhandler recognizes,¹¹⁰ temporary "takings" of property may involve no monetary enrichment of the state at all, yet the Court requires payment of "just compensation"

and Suits Against Government Officers, 1984 SUP. CT. REV. 149, 167 (noting that the Constitution is not amended to change captions on complaints).

107 While Woolhandler's descriptions of cases are meticulously careful, it is her effort to cast the more recent cases as resting on remedial assumptions similar to those of the 19th Century cases that I find unpersuasive.

108 415 U.S. 651 (1974).

109 See Jackson, *supra* note 54, at 69 n.284. My point here is that the distinction between states being able to keep (or expend for other purposes) money that is in some sense not theirs and pure "expectations" based claims does not explain the distinctions in those forms of relief against officers that will and will not be treated as claims against the state under the Court's current approach. *Edelman* involved a federally funded "entitlement" program; each individual's claim for past due payments is for discrete, limited, and easy to ascertain amounts, and as the lower court found, could readily have been understood as a claim for "restitution" of benefits. See *Weaver v. Jordan*, 472 F.2d 985, 993 (7th Cir. 1973), *rev'd*, 415 U.S. 651, 665-66 (1974).

110 Woolhandler, *supra* note 8, at 928 n.52.

to the property owner. In short, the distinction between restitutionary claims based on unjust enrichment and "expectations" based damages claims does not neatly track either the distinctions between "old" and "new" property nor the distinctions drawn in the Court's Eleventh Amendment and related sovereign immunity law.

Woolhandler's normative arguments against permitting damages awards for difficult to predict "lost expectations" as posing a greater threat to state fiscal integrity than other forms of relief may have substantial merit. States are not, after all, like either private businesses that must accept the discipline of the market and which may disappear as entities through bankruptcy or merger, nor like cities, counties, or other subdivisions not guaranteed constitutional status and continuity and which can be manipulated or abolished by the states.¹¹¹ States are required by the Constitution to exist, in a form capable of performing important government functions; the Constitution contemplates the "continued existence" of the states in a "perpetual Union."¹¹² Without attempting a response to Woolhandler's claims about corrective and distributive justice, let me simply proceed on the basis that there may be sound constitutional reasons to be more concerned about remedial regimes that can result in the award of unpredictable and large damages awards against constitutionally sovereign entities. But even assuming this to be true, it would not follow that all claims against states, or all claims against state officers for monetary relief that would be paid from the state treasury, should be constitutionally barred. The relief sought in *Edelman v. Jordan*, for example, was limited by federal law to readily calculable past due benefits, as is relief in other similar claims to discrete "entitlement" payments from governments. Thus, some of her normative arguments might well support remedial immunities for some elements of damages awards, but they do not support the rules the Court has promulgated in the name of the Eleventh Amendment and the purportedly constitutional principle of state sovereign immunity.

111 See Richard Briffault, "What About the 'Ism'?" *Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1336 (1994).

112 See *Alden*, 119 S. Ct. at 2247 (noting "textual provisions of the Constitution [that] assume the States' continued existence and active participation in the fundamental processes of governance"); *Texas v. White*, 74 U.S. (7 Wall.) 700, 725-26 (1868) (noting the role of states in the "perpetual union"); see also *Printz v. United States*, 521 U.S. 898, 919 (1997); *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). See generally Jackson, *supra* note 35, at 2264-47. The first Constitution of the United States was denoted "Articles of Confederation and Perpetual Union," and reference to the "perpetual union" was common in the 19th century. See, e.g., *The Civil Rights Cases*, 109 U.S. 3, 50-51 (1883) (Harlan, J., dissenting).

B. *Sovereign Immunity and Suits Against Officers: Of History, Coherence, and Supremacy*

Professor Vázquez's article calls our attention to conflicting strands in the Court's recent decisions. On the one hand, he notes, the Court treats state sovereign immunity as posing no significant bar to the effective enforcement of federal law against the states. On this view, alternative mechanisms (including *Ex parte Young* actions and other suits against officers, suits by the United States against the states, and the good faith of the states) will secure appropriate compliance with valid federal law, and the sovereign immunity of the state is a formal, almost vestigial doctrine, having little functional importance given the possibility of damages awards against state officers which the state would feel practical impulses to indemnify for.¹¹³ On the other hand, he notes, the Court's more recent opinions herald a relatively new note, one that he calls the "state sovereignty" strand, under which the state's sovereign immunity is real and important, and must influence interpretation of other parts of the Constitution—including the Fourteenth Amendment—in order to avoid being circumvented or undermined.¹¹⁴

Professor Vázquez argues that, if what he calls the "state sovereignty" strand of the Court's recent cases is to be taken seriously, its logic requires that officer immunities be regarded as constitutionally compelled and as applicable in actions against government entities that employ officers.¹¹⁵ This argument may illustrate the risk that, once one accepts that "state immunity" is an important constitutional principle, "coherence" will carry one far down the path of precluding individual justice and limiting the scope for "rule of law" and "supremacy" concerns to operate. Professor Vázquez also appears to offer qualified endorsement for constitutionalizing officers' immuni-

113 See Vázquez, *supra* note 7, at 863–88. Note that even on Vázquez's view of this "supremacy" strain, the current state of affairs imposes some "real" costs in terms of actual gaps in remedies, see *id.* at 880, that would require multifold changes in doctrine to fix. Although Professor Vázquez has been critical of the distinction between contract and tort claims in this area, his emphasis on the remedy of suits against state officers might not—absent change in substantive doctrine—permit recovery against state officers on pure contract claims against a state (unless the contract were specifically to make an officer a guarantor or otherwise co-liaible on the state's contracts), given what I understand is an accepted rule that a disclosed agent is not ordinarily liable for performing the principal's contract. See RESTATEMENT (SECOND) OF AGENCY §§ 320, 328 (1957).

114 See Vázquez, *supra* note 7, at 888–93. For my further discussion of the "principle" of immunity, see *infra* Part III.

115 See Vázquez, *supra* note 7, at 902.

ties as well from a "supremacy" strand perspective, on the theory that official immunities are designed to achieve optimal deterrence of legal violations.

Vázquez's positive argument in favor of retaining officer immunity as constitutionally compelled appears to rest on the following assumptions—first, that those immunities are calibrated to achieve appropriate constitutional goals (deterrence of federal law violations and noninterference with enforcement of valid state laws), and second, that there would be no change in the appropriate calibrations if the liability were shifted to the government. As to the first assumption—that the Court determines (or seeks to determine) what immunities are required so as to optimize deterrence of wrongful conduct while minimizing adverse effects on the proper execution of the laws—Professor Vázquez acknowledges that the current shape of official immunity doctrine may provide more protection against individual liability than is necessary. But he argues that the basic remedial framework is capable of being adjusted to provide appropriate levels of deterrence and appropriate protection of the supremacy of federal law.¹¹⁶ Other distinguished federal courts scholars also assume or argue that the current framework of remedies and immunities is about right.¹¹⁷ But the empirical basis to conclude that the system of remedies on the whole works appropriately to deter violations of federal law and properly redress the wrongs done to those injured by violations that do occur is thin; defining a baseline of "acceptable" levels of violation is controversial; and at least one recent study suggests that the current system may both overdeter law enforcement officials and undercompensate those who are wronged.¹¹⁸ Before officer immunities are entrenched and extended to entity liability in a way that cuts

116 See *id.* at 903; see also John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47 (1998).

117 See Woolhandler, *supra* note 8, at 921; see also Jeffries, *supra* note 116, at 53–54 ("[C]onstitutional tort regime based on fault is wise policy" and "[t]o that extent, . . . the law of the Eleventh Amendment and Section 1983 [is] fundamentally sound, despite rococo doctrine and occasional nuttiness. . . . [V]iewing the Eleventh Amendment and Section 1983 as an integrated liability regime . . . show[s] the hidden sense in current law."); Jeffries, *supra* note 5, at 99–100 (asserting that the qualified immunity concept protecting officers from personal liability without fault has the advantage of allowing the development of new law).

118 See Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under Bivens*, 88 GEO. L.J. 65, 78, 96–97 (1999) (arguing principally that *Bivens* suits underdeter and underremediate but noting that "residual uncertainty" about indemnification and uncertainty about the scope of immunity may cause concern for individual officers). One wonders, for example, whether, if the remedial system for public officer wrongdoing were well-calibrated, one would see the

off opportunities for redress, they should be more carefully, and empirically, scrutinized.

Even if one were to assume that the present system in some way optimizes deterrence and that that is the most important goal of a judicial remedial system, Vázquez may well be mistaken in thinking that, in a system of state liability, the same liability awards and the same immunities would achieve the same levels of deterrence as in a system of individual liability. Whatever the theoretical inclinations of a hypothetically rational state officer to either purchase liability insurance or insist on indemnity from the state,¹¹⁹ an organization's capacities to plan for and minimize liabilities are much greater than any individual officer's, and an organization's abilities to raise revenue are much greater than any individual officer's. The rationality of an individual is simply not identical to the rationality of an organization; the information available to an organization and its costs of acquiring and sharing that information are not identical to the costs for individuals acting on their own.¹²⁰ The costs of determining whether officers are entitled to indemnification are not trivial, and the uncertainties introduced by that process may, as a realistic matter, both overdeter and underremediate violations of law.

Although it maybe correct that if one takes the principle of state sovereign immunity as of fundamental and real importance, and focuses only on this, it would be logical to impose constitutional limits on officer liability in order to avoid pressures for state indemnification, I am unpersuaded that the immunities of executive officials should be regarded as constitutionally compelled in any of their de-

number of well-publicized episodes of alleged police brutality against minority group members in custody that we have in recent years.

119 See Vázquez, *supra* note 7, at 904.

120 See PETER SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 98 (1984) ("[M]uch wrongdoing is rooted in organizational conditions and can only be organizationally deterred."); see also *id.* at 5-12 (describing conditions pertaining to law compliance and the need for the government entity to identify, and communicate, legal norms, and change practices to minimize violations of law); Meltzer, *supra* note 12, at 1020-23. There is law and economics literature arguing that under some conditions regimes allocating liability to individual employees produce identical results to regimes of entity liability. See, e.g., Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857 (1984); Larry Kramer & Alan O. Sykes, *Municipal Liability Under § 1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249; Christopher D. Stone, *The Place of Enterprise Liability in the Control of Corporate Conduct*, 90 YALE L.J. 1 (1980). But these conditions are typically not met in public employment settings, where, for example, the sued employee's assets are likely to be small relative to the injuries complained of (and the assets of the entity). See, e.g., Kramer & Sykes, *supra*, at 272, 276-87 (exploring effects of different regimes where the individual employee is judgment proof).

tail, much less that the Constitution would compel extension of those immunities to the entities in question. Older cases, like *Little v. Barreme*,¹²¹ recognized no immunity for those who acted without statutory authority. It may be that a historically authentic inquiry into the common law remedial system would distinguish between the nature of immunities available for different kinds of wrongful acts committed by executive officers. The Court has treated the question of executive immunities as a matter of federal common law, changing the standards as appeared to the Court empirically necessary to achieve appropriate levels of litigation, deterrence, and remediation.¹²² While some of the absolute immunities—for judges and for legislators as to legislative voting—may be constitutionally necessary in order for those officers to fulfill their constitutional roles, no similar tradition of which I am aware would have required any particular form of personal immunity for an executive officer.

But perhaps the most important point, for purposes of this Article, is to challenge the appeal to coherence as a basis for constitutionalizing and extending official immunities. To the extent that Professor Vázquez's argument rests on the goal of seeking coherence with the principle of sovereign immunity, it is my claim that at this point one should prefer more opportunities for individual justice over greater coherence.¹²³

C. *Taking the Court at Its Word*

Finally, I want to note that the Court does not conceptualize its decisions in these three cases as propounding a rational remedial regime, consistent with historic traditions of relief for government wrongdoing and best designed to achieve appropriate levels of deterrence of state conduct that violates federal law.¹²⁴ It is worth remem-

121 6 U.S. (2 Cranch) 170 (1804).

122 See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The *Harlow* standard is applied as well to § 1983 actions against state or local officials. See, e.g., *Anderson v. Creighton*, 483 U.S. 635 (1987).

123 A further question raised by Professor Vázquez's argument is its effects on official immunity for federal officers. At least since *Harlow* the Court has applied identical immunities to federal, state, and local officers. See *supra* note 122. Under current law, Congress has power to waive the federal government's immunity from suit on any kind of claim but lacks power to abrogate states' immunity except when acting under Section 5 of the 14th Amendment or possibly other post-11th amendments. Where Congress cannot abrogate state immunity, it may well have good cause to substantially narrow the range of officer immunity for state officers, while regarding the federal government's consent to be sued as obviating the need to do so for federal officers.

124 But see Vázquez, *supra* note 7, at 877–78 (arguing that the Court views individual officer liability as a more effective deterrent than entity liability). Professor Váz-

bering that the Court essentially eschewed history (in the sense of the judicial precedents and common law remedial traditions) as a help in understanding the scope of states' immunity from suit in federal courts when, in *Pennhurst State Sch. & Hosp. v. Halderman*,¹²⁵ it announced that it was not history and remedial traditions, but rather the supremacy of federal law, that justified *Ex parte Young* actions for injunctive relief under federal law but not for injunctive relief under state law.¹²⁶ And in both the nineteenth century, and in the most recent cases, the Court has not, for the most part, sought to justify sovereign immunity by reasoned argument.¹²⁷ Rather, it claims that "the contours of sovereign immunity are determined by the Founders' understanding, not by the principles or limitations derived from natural law" or other sources.¹²⁸

quez cites *FDIC v. Meyer*, 510 U.S. 471 (1994), in support, which in turn explains first, that the individual officer remedy against federal officers recognized in *Bivens* (a remedy that parallels the § 1983 remedy against state officers) was created because sovereign immunity barred the remedy against the entity—and, by implication, not because it was deemed more effective. Later, the opinion quotes from *Carlson v. Green*, 446 U.S. 14 (1980), in which the Court noted that a *Bivens* remedy runs against individual officers, and is thus a more effective deterrent than the Federal Tort Claims Act, Pub. L. No. 79-601, 60 Stat. 842 (1946) (codified as amended in scattered sections of 28 U.S.C.) (FTCA) remedy, which runs against the United States. This statement in *Green* is ambiguous, suggesting that the greater effectiveness might have depended on who the defendant was or on the limitations of the FTCA remedy: FTCA claims are hedged by a number of limitations and procedures not applicable to the *Bivens* cause of action. A reading of the entire passage in *Meyer* does not support the view that the Court, in recognizing suits against officers, was primarily motivated by the view that such actions were better deterrents than actions against the government itself—at the time *Bivens* was created, suits against the United States itself were regarded as barred by the federal government's sovereign immunity.

125 465 U.S. 89 (1984).

126 See *id.* at 105–06; see also Jackson, *supra* note 54, at 60–62 (criticizing the Court for shifting away from justifications based on remedial traditions).

127 See *United States v. Lee*, 106 U.S. 196, 206 (1882) ("[I]t is difficult to see on what solid foundation of principle the exemption from liability to suit rests."); see also *Seminole Tribe*, 517 U.S. at 68–69 (offering historical claims that sovereign immunity existed and was important, but not reasons in principle). For one possible exception, see *Alden*, 119 S. Ct. at 2264–66, where the Court suggests that sovereign immunity is consistent with self-governance. The Court fails, however, to explain why self-governance of the nation, when Congress acts within an enumerated power to abrogate a state's immunity, see Daniel A. Farber, *Pledging A New Allegiance: An Essay on Sovereignty and the New Federalism*, 75 NOTRE DAME L. REV. 1133, 1143 (2000) (describing *Alden* as struggling "in vain to find some practical function for sovereign immunity"), would not support precisely the contrary result—raising the unanswered question, on what basis did the Court choose to value state self-governance over national self-governance notwithstanding the Supremacy Clause?

128 *Alden*, 119 S. Ct. at 2257.

If what the Court was doing were simply giving effect to traditional forms of action and providing super-protection to the states from suits on their own contracts, this field would be far less troubling than it is. But the Court has expanded the scope of state sovereign immunity beyond that understood by the framing generation, rejecting John Marshall's party of record rule by which federal jurisdiction over an action to recover money in the hands of Ohio tax officials was sustained.¹²⁹ It has, at the same time, increased the scope of immunities that officers enjoy when sued for violations of federal law beyond those contemplated by the older cases. So the claim that it is determining the scope of immunities based on historic understandings does not ring true. As to Professor Vázquez's argument, I agree that it would be appropriate for the Court to consider the balance between remedial effectiveness and interference with governance in defining the shape of a federal common law of remedies for government wrongdoing, a background set of rules against which Congress would legislate. But that is not what the Court is doing here, either. What the Court apparently sees itself doing is protecting state sovereign immunity as a deep constitutional principle—in ways that do not correspond to traditional distinctions or to the distinction Woolhandler propounds between new and old property. In doing so the Court is increasing the zone of government non-accountability to law, in ways inconsistent with the Supremacy Clause, with basic rule-of-law notions, and with representative self-government at the federal level.

III. ON COMPROMISE AND PRINCIPLE AS ASSUMPTIONS IN CONSTITUTIONAL INTERPRETATION

Prominent in several of the contributions to this Symposium is the recognition that the Court is now treating "sovereign immunity" as a very basic and important constitutional principle.¹³⁰ Professor Vázquez, for example, is quite right to notice that the Court's recent cases have elevated the principle of sovereign immunity to a positive value in ways that differ markedly in tone from decisions earlier in this century.¹³¹ It is one thing to say, we have sovereign immunity because we have always had it (even if there are not terribly good reasons why),

129 See *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824).

130 See Farber, *supra* note 127 at 1135–37 (noting the majority's "reverential language toward the states"); Meltzer, *supra* note 12, at 1032–37 & n.110 (noting the "seemingly relentless expansion of state sovereign immunity"); Vázquez, *supra* note 7 at 888–91.

131 See Vázquez, *supra* note 7, at 860, 888–90 (discussing the "increasing prominence" of "state sovereignty" concerns in, for example, *Coeur d'Alene*, *Alden*, and *College Savings Bank*). For a similar argument predating this Term's trilogy, see Vicki C.

and we must to some extent accommodate our doctrine to it. On this view, the immunity may be treated, as Vázquez suggests, as something of a formality, barring only limited forms of relief and capable of being circumvented through various devices of pleading. While David Currie has written that the Constitution was not likely to be amended simply to change the caption on a complaint,¹³² historical scholarship has shown that in the nineteenth and early twentieth centuries distinctions in the captions of complaints were in some significant ways what the immunity was about.¹³³

But for this Court, the *Seminole Tribe* Court, the idea of sovereign immunity has assumed mythic proportions. Indeed, it sometimes seems to be carrying most of the weight of the Court's commitment to judicial enforcement of federalism restraints on its back. That the Court now treats the idea of sovereign immunity (and the Eleventh Amendment as emblemizing it) as deep and fundamental constitutional principles seems clear. Now what are we to make of this?¹³⁴

A. *The Problem: The "Principle" of State Sovereign Immunity and the "Compromise" of the U.S. Senate*

Clearly the Court is treating the Eleventh Amendment as standing for an important though unwritten constitutional principle, a "postulate," of deep significance. *Alden* says that while the states' immunity from suit is "sometimes referred to . . . as 'Eleventh Amendment immunity,'" the "sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment."¹³⁵ The *Alden* Court quotes *Monaco v Mississippi*:

Jackson, Coeur d'Alene, *Federal Courts and the Supremacy of Federal Law: The Competing Paradigms of Chief Justices Marshall and Rehnquist*, 15 CONST. COMMENTARY 301 (1998).

132 See Currie, *supra* note 106, at 167.

133 See *Osborn*, 22 U.S. at 738 (asserting that if the state could have been pleaded as a party defendant it should have been, but if not, the party of record rule would apply to permit suit to proceed against the state officers); see also Woolhandler, *supra* note 76, at 130-32, 136-37; see also *supra* text accompanying notes 103-07 (discussing *O'Connor*).

134 For a thoughtful explication of the reasons for the resurgence of the 11th Amendment and state sovereign immunity, see Fletcher, *supra* note 19, at 843; for my own earlier thoughts on this, see Jackson, *supra* note 1. For a perceptive description of the new constitutional faith informing these and other decisions, see Farber, *supra* note 127, at 1133.

135 *Alden*, 119 S. Ct. at 2246. If the Amendment were merely clarificatory of a deep understanding that states were immune from suit by any one, it is odd that it is not more clear in expressing this understanding. For an alternative explanation of what the Amendment was clarifying that supports the "diversity repeal" view, see Pfander, *supra* note 53, at 1355-56 (arguing that the Constitution was not intended to

Manifestly we cannot rest with a mere literal application of the words of § 2 of Article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States. Behind the words of the constitutional provisions are postulates which limit and control.¹³⁶

Thus, since *Hans* held that the principle of immunity for which the Amendment stands bars suits against a state in federal court by the state's own citizens, the "principle" has been expanded to bar suits in admiralty, suits by a foreign state against a state, suits specifically authorized by Congress under Article I powers, and, in *Alden*, suits in state courts without the state's consent.

Just as clearly, however, the Court treats other portions of the Constitution—including provisions relating to federalism—not as standing for generalizable, deep principles but as more constrained, as principles of more limited application, or as the product of compromise, representing no principled consensus at all but simply a *modus vivendi*. Consider *Reynolds v. Sims*,¹³⁷ where the Court asserted that "the fundamental principle of representative government in this country is one of equal representation for equal numbers of people Legislators represent people, not trees or acres."¹³⁸ While *Reynolds v. Sims* treated equality of representation as a fundamental and deep principle, it treated the Constitution's provisions for the United States Senate quite differently. Responding to Alabama's argument that the apportionment of two U.S. Senators to each state regardless of population suggested that a state had legitimate interests in apportioning its own legislature on a basis other than population, the Court explained,

We . . . find the federal analogy inapposite and irrelevant. . . . The system of representation in the two Houses [of Congress] is one . . . conceived out of compromise and concession indispensable to the establishment of our federal republic. . . . [I]t is based on the consideration that in establishing our type of federalism a group of formerly independent States bound themselves together under one national government. . . . [S]ubdivisions of States . . . never were and never have been considered as sovereign entities The

change liability rules for debts incurred by states prior to enactment of the Constitution and that the 11th Amendment was intended as a narrow correction to *Chisholm*, which had entertained an action to enforce such a debt under a diverse-party head of jurisdiction).

136 *Alden*, 119 S. Ct. at 2254 (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322 (1934)).

137 377 U.S. 533 (1964).

138 *Id.* at 560–62.

relationship of the States to the Federal Government could hardly be less analogous.¹³⁹

The federal analogy is seen as inapposite, then, in part because the composition of the Senate was "conceived out of compromise and concession." The compromise provision for equality of state representation in the Senate is not understood as a principled model for the internal composition of the states' legislatures, but rather as something to be contained, so as not to obstruct the larger "principle" of equal representation of persons described above.¹⁴⁰

Bruce Ackerman has recently argued that another part of the Constitution represents at best a compromise (with evil) and not a general principle to be expanded upon. In arguing that the Constitution's "direct" taxes provision does not limit Congress from considering proposals for flat taxes, Ackerman draws attention to early decisions narrowly interpreting this limitation on the federal taxing power, on grounds that explicitly note the origin of the phrase in an effort to protect the property of slave owners from being taxed.¹⁴¹ Ackerman approves of those Justices who, seeing the degree to which

139 *Id.* at 573–75.

140 As is clear from the quotation in text above, the Court provides an additional reason why the compromise represented by the Senate should not be extended: that the subdivisions of the states were never independent sovereigns. *See id.* at 575. Passing the point that it is not at all clear that the states were ever fully independent sovereigns, *see* Jack Rakove, *Making a Hash of Sovereignty*, Part I, 2 GREEN BAG 2d. 35, 39–43 (1998), functional differences between local governments and the states under the Constitution might support the Court's refusal to extend the principle of the Senate: while Congress is prohibited from manipulating state boundaries, no such federal constitutional limit applies to the states' powers to manipulate the boundaries of its internal divisions, *see* Briffault, *supra* note 111, at 1335–36. This power to manipulate coupled with a power to establish non-population based units of representation might have been seen as opening the door to too much in the way of anti-democratic possibilities. The *Reynolds* Court could be taken to say that the "principle" for which the Senate stands is that the states had some form of sovereignty but not necessarily the power to decide on a principle of internal representation that deviates from one-person one-vote. By a similar argument, the 11th Amendment might be taken to stand, not for the principle of state sovereign immunity, but for the principle that states were sovereign to some extent—that is, at a level of generality about the principle at hand that would not resolve (at least not in the Court's direction) the question of state immunity on federal-question claims by a state's own citizens. For one discussion of the problem of levels of generality, *see* Laurence H. Tribe & Michael Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990).

141 *See generally* Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM L. REV. 1 (1999). Ackerman describes how one leading "states-rights" member of the Convention responded as a Supreme Court Justice to the first challenge to a federal tax as violating the rule on direct taxes:

a provision like that limiting the tax power was born of compromise, sought to restrain its interpretation.¹⁴²

Intelligent and reasonably principled constitutional interpretation would seem to require that we be able to distinguish among different kinds of constitutional provisions: to identify those that are fundamental, and must be given effect beyond their literal terms on the basis of what those terms signify more generally, and those that are limited to their literal and obvious application. Some scholars have suggested a distinction between what they describe as constitutions of "principle" and constitutions of "compromise,"¹⁴³ though in some senses, every constitution is a constitution both of principle and

While Paterson ultimately endorsed the Constitution, he should be viewed as the leading Founder committed to states' rights, and so his view should be considered with special care:

On the part of the plaintiff in error, it has been contended, that the rule of apportionment is to be favored, rather than the rule of uniformity; and, of course, that the instrument is to receive such a construction, as will extend the former, and restrict the latter. I am not of that opinion. The constitution has been considered as an accommodating system; it was the effect of mutual sacrifices and concessions; it was the work of compromise. The rule of apportionment is of this nature; it is radically wrong; it cannot be supported by any solid reasoning. Why should slaves, who are a species of property, be represented more than any other property? The rule, therefore, ought not to be extended by construction.

Again, numbers do not afford a just estimate or rule of wealth. It is, indeed, a very uncertain and incompetent sign of opulence. This is another reason against the extension of the principle laid down in the Constitution.

Id. at 22–23 (quoting *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 177 (1796)). This is a candid argument that the rule of apportionment was a "work of compromise" and "ought not to be extended by construction." *Id.*

142 See Ackerman, *supra* note 141, at 22 (approving of the Court's unanimous rejection of an early "effort to transform a narrow bargain with slavery into a grand principle of federalism that would cripple [federal] taxing powers"); *id.* at 51 (arguing that, other than to strike down a classic "capitation tax," the Court should not "expand the direct tax provisions beyond this textually enshrined example in obedience to a deal with slavery that America has otherwise abrogated"). On my view the 11th Amendment should not be "expanded" beyond its text, which should be read as barring federal courts from exercising "diversity" based jurisdiction over claims against states (with possible implications as well for supplemental jurisdiction). See Jackson, *supra* note 54, at 55–59; see also *id.* at 72–104 (arguing that sovereign immunity can help shape federal common law of remedies without precluding congressional abrogation).

143 See, e.g., Wiktor Osiatynski, *The Constitution-Making Process in Poland*, 13 LAW & POLICY 125 (1991), reprinted in Vicki C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 288–93 (1999).

of compromise. When judges are called on to determine the meaning of some aspect of the Constitution (whether text or a claimed extra-textual rule), should it matter whether that aspect is seen as a compromise or as a principle? Since the Court evidently does distinguish between those provisions that are to be cabined to their terms, or construed narrowly, and those that are understood merely as representatives of a basic principle to be given broader expression through interpretation, how does—how should—it decide?

B. On the Impossibility (and Inevitability) of Distinguishing Constitutional Compromise from Constitutional Principle

The possibility of distinguishing between “compromise” and “principle” may be chimerical and involves many of the contingencies and indeterminacies that trouble constitutional interpretation more generally. Assuming one could agree on what constitutes a “principle” as opposed to a “compromise,” language agreed on by groups almost always involves some degree of compromise, over nuance if not over larger questions. Moreover, “principled” portions of a constitution may have been “bargained for” in compromises over other portions, entailing risks that divergent interpretive approaches based on the asserted difference between compromise and principle would fail to meet the expectations of the drafters (if their expectations are relevant, which might be a different matter for multi-generational constitutions than for ordinary statutes).¹⁴⁴ While some provisions of the Constitution are commonly described as compromises (e.g., those dealing with slavery and the three-fifths rule), even the most basic structural decisions of the 1787 Convention were also compromises—

144 For an excellent discussion of the difficulties entailed in efforts to determine the intent of a legal text that is produced by a multi-member body, see WILLIAM N. ESKRIDGE, JR. ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* 214–22 (2000). For an effort to ground a theory of statutory interpretation in the desire to constrain the effect of narrow interest group bargains towards more public-regarding results, see Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986) (arguing that the Court should not seek to discern and give effect to a “deal” behind legislation but rather should be limited by the enacted text in order to raise the costs and constrain non-public-regarding of legislative deal-making). Although the difficulties of distinguishing “private deals” from “public regarding” statutes are legion, many students of the legislative process still behave as though these differences are discernible. See, e.g., ESKRIDGE ET AL., *supra*, at 355–56 (discussing the Court’s narrow construction of some public grants as reflecting a suspicion of the legislative allocation of “public benefits to narrow interests” and its willingness to construe public grants more liberally when the grant “clearly promotes a public value” or “the costs and benefits of the grant are spread widely across the public”).

as in the "Great Compromise" establishing the "principle" that the national legislature is bicameral and that only one house of the national legislature is apportioned by population while the other is apportioned by state.

What about the "rights" provisions—do these reflect compromise or principle in the constitutional process? One might be tempted at first to say that the individual rights protecting provisions are more "principled" or more representative of deep principles than the provisions concerning government structure. But if the Fourteenth Amendment is to serve as an example, the answer to my question might be both. The Amendment was plainly intended at some level to guarantee rights of national citizenship and advance constitutional principles of equality before the law. But according to the Court, the Amendment also reflected a compromise between those who would empower Congress entirely to define the rights of citizens and those who sought to constrain Congress's powers to those of enforcement rather than definition of rights.¹⁴⁵

Since the entire Constitution of 1787 was in a sense founded on compromises, the effort to distinguish among its provisions and associated amendments on such a basis may be one doomed to failure. Despite the conceptual difficulty—and perhaps the impossibility—of drawing a principled line between principle and compromise, it is hard to resist the temptation to attempt such an effort. As a sociolegal matter, as a constitution exists over time, understandings of its basic "principles" also evolve, with some aspects tending to assume larger proportions than others based in part on ascription as large principles (rather than as compromises).¹⁴⁶ One could resort to familiar (though contestable) techniques to determine whether particular pro-

145 See *City of Boerne v. Flores*, 521 U.S. 507, 520–24 (1997). In evaluating the accuracy of the Court's history of the 14th Amendment as a compromise between these purposes, see the work of historian ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877*, at 251–61 (1988) (suggesting that the revision of Bingham's initial proposal reflected a desire to strengthen the Constitution's protections of rights by securing them against congressional weakening should Democrats take over Congress after the Amendment was ratified by assuring that the courts could directly enforce the guarantees of Section 1 without Congress).

146 Recognizing the evolution of constitutional understandings marks me as neither a "pure originalist" nor as someone who believes that history and original understandings have only indeterminacy to offer. On constitutional interpretation, I find much to admire in the complexity and nuance of such works as Fallon, *supra* note 75, at 1194–1209, Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1 (1998), and David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996) as well as in Professor Dworkin's work, *infra* note 147.

visions are reflective of larger principles or more narrow principles or compromises, techniques discussed both by constitutional theorists and statutory interpreters.¹⁴⁷ But it is almost impossible to escape the enterprise of categorizing aspects of the Constitution as more or less central, more or less basic, and more or less subject to judicial elaboration as constraints.¹⁴⁸

But what, if any, significance do these possible differences have for the task of interpretation over time? I do not mean to suggest that seeing something as a "compromise" means that subsequent generations can ignore its provisions or need only give it the most ritualistic protection. Compromise is important; compromise between competing principles is often essential to constitution making and maintenance; security in enforcement of compromises may be important for future bargaining; and compromises may have become embedded in a legal landscape and require continued enforcement in order to promote stability and coherence. My claim is that whether a proposition is seen as a matter of principle, or as a more narrow compromise, may influence the degree to which the proposition is extended to new situations.¹⁴⁹

147 Provisions reflecting more specific and narrow language may, for example, reflect more specific and narrow purpose than others. General language may be suggestive of agreement on a general principle; more detailed, specific language may reflect either a narrower principle or a carefully crafted compromise by the drafters. Compare, e.g., U.S. CONST. amend. XII (establishing voting rules for presidential selection in the House of Representatives), with U.S. CONST. amend. XIV (guaranteeing "equal protection"). Cf. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 131-49 (1977); Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 477-78, 488-97 (1981) (distinguishing general proposition or concepts from more specific "conceptions" and discussing the differences between "abstract and concrete" intentions).

148 This process of categorization may take place with respect to particular provisions or with respect to claims of extratextual understandings (such as that equality of treatment is a bedrock requirement for both state and federal governments, see, e.g., *Bolling v. Sharpe*, 347 U.S. 497 (1954), notwithstanding the existence of slavery at the time the Fifth Amendment's Due Process Clause was adopted). Identifying what the principles are and, in the event of a conflict between different versions of a principle, which version is "right" or "fits best" is a major task of constitutional interpretation. For a brief discussion of how to characterize the "principle" of the Eleventh Amendment (if it were viewed as a principle and not a compromise), see *infra* note 150.

149 One possibility is that this difference should have no effect—that once a Constitution is ratified, its parts should all be treated as "law" by the courts and no part should be favored; the task of rendering judgment requires the Court to take a neutral stance with respect to whether particular provisions were included as a result of agreements in principle, unresolved compromises, or adventitious events—all of the Constitution is equally "law." Frank Michelman writes, for example, that while compromise in writing or amending a constitution is inevitable and is accepted as legitimate, once a text is ratified the "conventional wisdom" is that the Supreme Court

C. *Interpretive Implications of Understanding the Eleventh Amendment as a Compromise Rather Than as a Principle*

Notwithstanding the conceptual and interpretive difficulties, the Court itself has, on occasion, treated the Constitution as if it could distinguish those parts reflecting compromise and entitled to no further application beyond their immediate reach, from those aspects of

Justices are to be "faithful servants" of that constitutional law. See Frank Michelman, *Saving Old Glory: On Constitutional Iconography*, 42 STAN. L. REV. 1337, 1340-44 (1990). But while in form it might seem possible to say, treat the entire Constitution in all its provisions as equally "law" and interpret each according to the same methodology, in practice it is not. The human search for meaning and the inevitable carrying-on (and transmutation of) understandings of the breadth of the principle for which a provision (or a Constitution) stands will necessarily be subject to dispute, contention, and resort to claims of both original understandings and overall structure.

Michael Dorf has suggested a different problem in comments on this idea: he argues that history suggests that to the extent the Court sees a portion of the Constitution as involving a compromise, it will be inclined vigorously to enforce its terms despite the evil or lack of justice in so doing. See Michael Dorf, *No Federalists Here: Anti-Federalism and Nationalism on the Rehnquist Court*, 31 RUTGERS L.J. (forthcoming 2000). His example is *Dred Scott*, 60 U.S. (19 How.) 393 (1856). But in *Dred Scott*, the Court was enforcing what it saw as a constitutional principle that slaves were property, a principle barring Congress from interfering with the growth of slavery as an institution. Ignoring the compromise reflected in the Constitution's text (i.e., the absence of the word "slave," the fact that slaves counted as three-fifths of persons for representation and taxing purposes, that Congress was prohibited to regulate the slave trade but only for 20 years, etc.), the Court adopted a controversial interpretation that one could say either was based on a principle nowhere spelled out in the Constitution, or alternatively, an interpretation designed (to borrow from the field of statutory interpretation) to give slaveholders the full benefit of a quite different bargain, a predicate of which was that there would be no federal interference with slavery's growth, a "bargain" or "principle" not reflected in constitutional text. See DON E. FEHRENBACHER, THE DRED SCOTT CASE 21-27 (1978); cf. Macey, *supra* note 144, at 226-27, 261-66 (suggesting that courts should not, in statutory context, attempt to give benefit of bargain beyond terms set forth in authoritative legal document in order to promote public-regarding process). Commentary on *Dred Scott* disagrees on whether the decision should be regarded as mistaken because it was immoral, or because it relied too much on "intentionalist" or originalist reasoning, or because it did a poor job of identifying those intentions, or even whether it was a correct reading of the Constitution as it then stood. (I believe it was not.) See generally Mark Graber, *Desperately Ducking Slavery: Dred Scott and Contemporary Constitutional Theory*, 14 CONST. COMMENTARY 271, 273 (1997) (describing as "fruitless" different contemporary efforts to describe, within particular theories, what was wrong with *Dred Scott*). I believe that it was the elevation of a compromise into a single-minded principle, and/or the misidentification of principle, that was at least part of the problem in *Dred Scott*. On this reading, *Dred Scott*'s well-deserved infamy is not inconsistent with my argument that the Court's jurisprudence would be helpfully mitigated by its viewing the 11th Amendment as the product of a narrow compromise rather than a great principle.

the Constitution that constitute deep, consensual principles.¹⁵⁰ Why, then, does it not see the Eleventh Amendment today, like the Senate or like the "direct taxes" provision, as a "compromise or concession" rather than as a "principle"? It is more than a bit mysterious that it is not so viewed. The precision and specificity of its language lend themselves to (though they do not compel) a narrow reading.¹⁵¹ The text is clearly limited to the federal judicial power, and a specific list of parties prohibited to sue states in federal courts is provided. I have elsewhere argued that the limited language and the circumstances of its drafting support an interpretation of this Amendment as not constraining the federal question jurisdiction of federal courts. A competing tradition, embodied in *Hans v. Louisiana*, exists and was embraced by the Court in *Seminole Tribe*. What I ask here is why, given the reasonable arguments in support of a much narrower understanding of the Amendment's scope in federal courts, and given the clear evolution over time of constitutional principles of government accountability under law administered by courts, would those who support the "*Hans*" view of the Amendment feel impelled to treat it as exemplifying a principle so much broader in scope than any arguable reading of its literal terms would support?¹⁵²

150 See *supra* text accompanying notes 137–40 (discussing *Reynolds v. Sims*). As noted earlier, the formulation of "compromise" and "principle" may be misleading: one might alternatively consider the "level of generality" at which to identify the "principle" or principles embodied in particular provisions. The "principle" of the Senate may be best understood by seeing the Congress as a whole as mediating between principles of equality of persons in representation and the sovereign status of the states. The 11th Amendment could be seen as mediating between principles that the judicial power should be as broad as the legislative under the federal question jurisdiction but that states as sovereign should not be subject to suit, without consent, on obligations incurred under their own laws or (phrased differently) as standing for the principle that states are quasi-sovereign permanent polities in the federal Union (and as such, have to be able not only to make but to control the enforcement of their own state laws against themselves, free from the jurisdiction of the federal courts).

151 See Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV L. REV. 1342, 1349–71 (1989) (arguing that "literal" meaning of the 11th Amendment's words should be applied to bar all suits against states by out of state citizens but not suits by in-staters, nor by foreign governments, and developing at length an argument that 11th Amendment language reflected a compromise designed to address narrow situations). Although diversity theorists differ from Marshall on whether the Amendment bars out-of-state citizens from suing a state in federal court under the "federal question" jurisdiction, both theories read the Amendment (far more narrowly than does the Court) not to bar suits by in-staters or by foreign states.

152 As my colleague Carlos Vázquez has recently reminded us, at least some number of the justices in the five-justice majority in *Seminole Tribe* and this year's trilogy found the question whether to overrule *Hans* a close one and ultimately decided

If the Eleventh Amendment were viewed as more of a compromise—a compromise between Federalists eager to retain the national government's power to enforce federal laws and treaties, on the one hand, and state leaders eager to protect states from injurious judgments on their revolutionary war debt,¹⁵³ on the other—how would that affect analysis of the question whether state courts had to entertain federal causes of action against states?¹⁵⁴ One cannot be confident that it would have had a dispositive effect. Under *Testa v. Katt*¹⁵⁵ there was an arguably open question whether a state court in a state that retained the doctrine of state sovereign immunity would nonetheless be considered to have jurisdiction otherwise adequate and appropriate to entertain (and thus be obligated to entertain) a nonconsented-to suit against a state.¹⁵⁶ While *Howlett v. Rose*¹⁵⁷ strongly suggests that state sovereign immunity rules will not be suffi-

to adhere to *Hans* for reasons of stare decisis; under these circumstances, he argues, "a doctrine whose reason for being is merely that the matter has already been so decided is clearly not a doctrine that warrants expansion." Carlos Manuel Vázquez, *Night and Day: Coeur d'Alene, Breard, and the Unraveling of the Prospective-Retrospective Distinction in Eleventh Amendment Doctrine*, 87 GEO. L.J. 1, 86–88 (1998) (noting that "Justice Scalia did not defend the correctness of *Hans* so much as conclude that overruling precedent was not justified," that few commentators affirmatively defend the *Hans* holding, and that "it is difficult to defend a regime in which federal law validly imposes obligations on the states but federal courts lack the power to entertain suits against the states to enforce those obligations").

153 In addition to the works in the 1980s by Judge Gibbons and then-Professor William Fletcher, see Pfander, *supra* note 53.

154 One possibility is that my effort here wrongly assumes the independence of one's view of the Amendment as a compromise (or as a relatively narrow principle) and one's view that the Amendment affects "federal question" jurisdiction at all. That is, one might think that the only way reasonable minds could conclude that the Amendment stands for no federal question jurisdiction in suits by private persons or entities against states in federal courts (as *Seminole Tribe* holds) is to view its enactment as emblematic of a deep constitutional principle, in which case, one would not be prepared to see this as a compromise. However, at least one member of the current majority at one time found the question of determining what the Eleventh Amendment meant, and whether *Hans* was correctly decided, to be quite difficult, see *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 496 (1987) (Scalia, J., concurring), and another wrote for the Court in *Hilton v. South Carolina Railways*, 502 U.S. 197 (1991) (Kennedy, J.), on the apparent assumption that the State's constitutional immunity from suit in federal court did not apply in the state courts (although the issue was whether the statute created a cause of action against the State, the State not having asserted sovereign immunity as such). See *id.* at 201–07.

155 330 U.S. 386 (1947).

156 The question I am addressing here is whether the Supremacy Clause simpliciter requires a state court to hear a federal claim against the state, and *not* whether, if the state court hears some arguably analogous claims against the state, the anti-discrimination principle of the Supremacy Clause requires that the state court hear the

cient to prevent that conclusion, there might be a difference under *Testa* between a sovereign state's effort to protect subordinate parts and a sovereign state's effort to protect its own treasury directly. And while *General Oil Co. v. Crain*¹⁵⁸ insisted on a state court's entertaining a suit that the state court regarded as barred by state sovereign immunity, the relief sought there was an injunction against a state officer and thus not at the core of what the Court has come to regard as the area protected by state sovereign immunity.¹⁵⁹ Reasonable minds might think that states' power to constitute their own organs of government includes a power to decide to protect states from suit in their own courts (even if they were suable in federal courts).

But even if one were so inclined, a less mythologized view of the significance of state immunity from private suits in the constitutional scheme might well have made a difference in the *Alden* case itself. A person viewing the Eleventh Amendment as a limited compromise, establishing a proposition in serious tension with deeper principles of government accountability under law, might have been more willing to recognize what strikes me as a patent discrimination against federal law by the State of Maine in its waiver of immunity.¹⁶⁰

federal claim. See Brief for the United States, *Alden* (No. 98-436) (identifying "Questions Presented"); see also *infra* notes 160-62.

157 496 U.S. 356 (1990).

158 209 U.S. 211 (1908).

159 Professor Woolhandler dismisses *General Oil Co. v. Crain* far too easily on these grounds, however, see Woolhandler, *supra* note 76, at 150-51, since the Court's opinion—befuddled as it is in light of *Ex parte Young*—proceeded on the assumption that the suit against the state officer would have been barred in federal court and, on this assumption, held that the Constitution required the state court to hear the claim. See *General Oil*, 209 U.S. at 226.

160 See Reply Brief for the United States at 4-5, *Alden* (No. 98-436) (explaining that the state courts entertain actions against private employers under the FLSA and "entertain[] suits against the State for monetary relief, including suits seeking wages that have been withheld in violation of state law"). As the United State's Reply Brief went on to argue,

Because those claims unquestionably are of the same general type as the claim asserted by petitioners in this case under any plausible view of such a test, the State's refusal to entertain petitioners' claim "flatly violates the Supremacy Clause."

Indeed, this case illustrates the extent to which, under the State's analysis, a State's assertion of sovereign immunity can be used to discriminate against federal law. Maine law permits state employees to bring an action in Superior Court to recover unpaid wages. Thus, an hourly worker who works more than 40 hours in a week, but is not paid by the State for those additional hours of work, may bring suit to recover unpaid wages. The only issue, then, is what substantive law should control the amount of recovery—*i.e.*, the specific hourly wage to which employees are entitled. Are employ-

The parties appear to be in agreement that the Maine state minimum wage (which was the same as the federal) applied to public employees and that public employees could sue the State to recover nonpayment of the minimum wage. Maine law, however, unlike federal law, did *not* extend the time-and-a-half provisions of their minimum wage law to public employees. Hence, public employees could not, under state law, sue the State for overtime claims, such as those asserted by Alden under the federal minimum wage law. The State argued therefore that, under *Testa v. Katt*, the state court lacked jurisdiction over the "analogous" state claim and thus had no obligation to entertain jurisdiction over the federal claim. But the petitioners in *Alden* clearly had the better of this argument that, having opened its state courts to suits by state employees against the State for back pay under state law,¹⁶¹ the state courts could not discriminate against a claim brought under federal law. Had the Court so ruled, it could have preserved something of the principle of state sovereign immunity while permitting the enforcement of valid federal law. In the face of the underlying policy disagreement with federal law about overtime pay for public employees, a court that focused on the Eleventh Amendment as a compromise provision, I suggest, would have been less likely to have so aggressively extended the "principle" of state sovereign immunity.

Instead, the *Alden* Court countenanced—with barely the back of its hand in consideration—a severe departure from the anti-discrimination rule of *Testa*.¹⁶² *Alden*, together with *Florida Prepaid*, thus

ees entitled to recover time and a half, in accordance with federal law, or are they limited to straight time, as provided under state law?

Id. (citations omitted) (citing *Howlett*, 496 U.S. at 381, and ME. REV. STAT. ANN. tit. 26, §§ 621(2), 626-A, 663(10), 670 (West 1988 & Supp. 1998).

161 See *Testa*, 330 U.S. at 386 (holding that since state courts had entertained double damage claims under similar statutes, they had adequate jurisdiction to entertain an "analogous" federal claim under a different statute providing for award of treble damages).

162 The *Alden* Court gave the discrimination claim extremely short shrift. In a section addressed to "[t]he sole remaining question . . . , whether Maine waived its immunity," *Alden*, 119 S. Ct. at 2268, the Court apparently limits the *Testa v. Katt* principle of nondiscrimination to contexts in which the state is not the party defendant (or in which there is no question of state immunity).

Although petitioners contend the State has discriminated against federal rights by claiming sovereign immunity from this FLSA suit, there is no evidence that the State has manipulated its immunity in a systematic fashion to discriminate against federal causes of action. To the extent Maine has chosen to consent to certain classes of suits, while maintaining its immunity from others, it has done no more than exercise a privilege of sovereignty

seems to hold that the assertion of state sovereign immunity to bar adjudication of a federal claim against a state can constitute neither discrimination against federal law under *Testa* nor a violation of the Due Process Clause. In short, sovereign immunity to private damage actions against a state is a super-strong constitutional principle, not easily subject to being overcome or qualified by other important constitutional principles.

Mark Tushnet argues that comparative constitutional study suggests that the principle of "bricolage" explains the building of constitutions, with borrowings and adaptations of ideas drawn from "an intellectual and political world that provides [constitution makers and interpreters] with a bag of concepts 'at hand,' not all of which are linked to each other in some coherent way As bricoleurs, . . . they reach into the bag and use the first thing that happens to fit the immediate problem they are facing."¹⁶³ He argues that "bricolage cautions against adopting interpretive strategies that impute a high degree of constructive rationality to a constitution's drafters . . . [and] brings the historical contingency of all human action to the fore,"¹⁶⁴ which in turn suggests that efforts to construe a constitution as a whole cannot be defended as an inquiry into actual intention. Beginning with what he describes as a modest premise that "some constitutional provisions should be understood to result from compromises

concomitant to its constitutional immunity from suit. The State, we conclude, has not consented to suit.

Id. It is, I suppose, possible to read this passage to mean that even in state court actions against *private* persons, state courts are free to discriminate against federal claims as long as they do not do so systematically. A far more plausible reading, however, is that the requirement of "systematic discrimination" applies (if it applies at all) only to claims against the state itself. As so understood, however, it is bad enough, apparently countenancing some relatively clear discrimination against federal claims as long as it is not too widespread.

163 Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1286 (1999).

164 *Id.* at 1229. Tushnet points to the "bricolage" found in several periods of constitution drafting, including our own, to challenge the links often assumed between what he calls "rationalized textualism" and "originalism":

Thinking about constitution-making as a process of "bricolage" casts doubt on a form of textualism that attributes to the constitution's writers a purpose of creating a tightly integrated document governed by a form of conceptual determinism. The compromises and sheer randomness found in the constitution-making process suggest that it would be wrong to think of the writers as having so highly rationalized an understanding of their work as this form of textualism attributes to them.

Id. at 1300.

that rest on no single coherent principle,"¹⁶⁵ his approach might suggest the need for skepticism about claims that a single amendment emblemized a deep and pervasive constitutional principle; for it is as likely that what went into the drafting and amendment process involved hasty efforts to respond to an immediate political problem.¹⁶⁶

I suggest that any constitution will be an admixture of elements: elements that constitute important principles on which the polity is built; elements that constitute compromises over central questions on which consensus cannot be reached; and elements of what Tushnet calls "bricolage" borrowed from other settings and contexts that exist somewhere between fundamental and consensual principles and fundamental and unresolved conflicts. Although the Constitution of 1787 is built on compromise over the nature of the federal system, it is appropriate to note the words "Great Compromise" used to describe the foundational piece of that process. The federal structure has survived in part because of the clarity and consistency with which the fundamentals of structure were described and have been adhered to—a House made up of representatives elected every two years and apportioned by population, a Senate whose members serve six-year terms, two from each state, a President separately selected through a national polling process, and a bar to carving up state territories without their consent. State sovereign immunity is at the periphery of those constitutional features that most importantly constitute the federal union. Many of those features were also born of hard fought compromise—but compromise that was indeed central to the union.

The Eleventh Amendment, by contrast, should be seen as a compromise on a relatively peripheral issue. A fair reader of history must conclude that the framing minds held different views on the amenability of states to suit¹⁶⁷ and must also agree that the language of the Eleventh Amendment is limited and specific. The principle of state

165 *Id.* at 1286.

166 The idea of "bricolage" may be more radically indeterminate in its capacity to challenge interpretive strategies built on any form of intentionalism; while one might say that the Amendment represented no more than a hasty political compromise responding to an immediate problem, one might alternatively say that the language, while narrow, was the best that could be done at the time to express a deeper principle. Other constitutional structures and principles can assist in reaching the best reading. See Jackson, *supra* note 54, at 44–51.

167 Since Justice Scalia in 1987 found the question whether to overrule *Hans* uncharacteristically difficult, see *Welch v. Texas Dep't of Highway & Pub. Transp.*, 483 U.S. 468 (1987), and ultimately voted to adhere to *Hans* in large part for reasons of stare decisis, see *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 30–36 (1989) (Scalia, J., dissenting), one might have thought the current majority would have been reluctant to "extend the precedent" in the way it has. See Carlos Manuel Vázquez, Breard, and

sovereign immunity, in its current iteration, is in conflict with two foundational constitutional principles: the supremacy of federal law and the rule of law under which governments as well as people are bound to the law and to ordinary legal remedies for the violation of law. In this light, the reasonable reader of history should be at least open to reading the resulting constitutional text as a limited compromise.¹⁶⁸

D. Alternatives to Protect the States: Making the "Real" Procedural Safeguards of Federalism Work?

A more nuanced and limited understanding of the Eleventh Amendment (and of the principle of sovereign immunity for which this Court believes it stands) would be beneficial for other reasons. Not only is the Court's current expansive understanding of state sovereign immunity lacking textual support in the Constitution and in its applications and inconsistent with other constitutional principles and with older remedial traditions, but history shows that the Court is, over the long-run, relatively unsuccessful in opposing its view to Congress on issues of federalism.¹⁶⁹

Let me be clear, though, that I do not suggest that the structure of federalism should never be protected by the Court. As I have argued elsewhere, the Constitution does quite clearly contemplate the continued existence of the states as constitutionally sovereign governments, elected and chosen by the people of each state, and accountable to perform executive, legislative, and judicial functions. Federal laws inconsistent with those constitutional responsibilities (as "commandeering" state legislature voting may well be, or perhaps congressional abolition of the immunities from damages of state judicial officers) must remain subject to judicial review.

the Federal Power to Require Compliance with ICJ Orders of Provisional Measures, 92 AM. J. INT'L L. 683, 690 (1998)

168 See Marshall, *supra* note 151, at 1349–71 (arguing that the 11th Amendment was a compromise and its text should be given very literal reading). Note also that sovereign immunity on federal claims is in conflict with the "political axiom" that "the judicial power of every well constituted government must be coextensive with the legislative." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 383–84 (1821).

169 See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (holding unconstitutional a federal prohibition on the interstate movement of goods produced in violation of restrictions on child labor), *overruled by* *United States v. Darby*, 312 U.S. 100, 116–17 (1941); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (invalidating federal Bituminous Coal Conservation Act of 1935 on the grounds that production such as coal mining can only be regulated by the states), *distinguished by* *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding a federal regulation of wages and hours in the production of steel and essentially rejecting *Carter's* reasoning).

But the political structure of the national political branches provides multiple opportunities for consideration of the interests of the states in their governmental capacities.¹⁷⁰ Legislation applicable to the states often reflects this consideration. For example, the Fair Labor Standards Act (FLSA) itself includes a set of exemptions from its substantive coverage provisions for states that in large part mirror exemptions extended to federal employees; as to covered employees, the remedies available against the federal and state governments under the FLSA appear quite similar.¹⁷¹ Since Congress is concerned with protecting the sovereign capacities of the United States government, it is unlikely to extend to the United States remedies or liabilities that would unduly interfere with those governing capacities; if similar remedies are extended against states, the political process will probably have accounted for any peculiarly governmental interests affected. Were the Court to overrule *Seminole Tribe* and/or *Alden*, and acknowledge congressional power to subject states to suits for damages under otherwise valid federal laws, courts could seek to enforce "safeguards" designed to encourage such legislative attention. The Court might consider establishing a presumption under Article I statutes that remedies that exist as against the United States can be extended to the states without threatening their constitutional sovereignty; remedies against states that do not extend to the United States would need to be separately evaluated to consider whether they unduly interfere with the governmental functions (or uniquely sovereign interests) of the states.¹⁷²

Such an approach would rely primarily on the political process to safeguard the governmental functions and existence of states by tying the federal government's treatment of states in part to its treatment of itself. It offers the advantage of restoring the Court to a basic posture of deference to Congress and the national political process in resolving questions of federalism—both on the suability of states on federal causes of action and on the substantive reach of federal legislation.

170 The record of the 104th Congress should give pause to those who say that the political process does not protect interests of states. See Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1501–71 (1994 & Supp. 1997). So too, as Professor Meltzer points out, does the recently re-issued Executive Order on Federalism, see Meltzer, *supra* note 12, at 1024–25, and the substantial attention being given in Congress to the pending Federalism Accountability Act.

171 See 29 U.S.C. §§ 203(e)(2)(A)–(C); 203 (e)(4)(A)–(B); 213 (b)(20) (1994 & Supp. 1997).

172 For further elaboration, see Jackson, *supra* note 1. Such a presumption might operate both at the level of constitutional law, that is, as a guide to determining whether a statute can constitutionally be applied to the states as against a federalism challenge, and as a guide to interpreting ambiguous statutes.

Deference is appropriate not only because of the structure of the national legislative process involving the President and Congress (as familiarly argued by Wechsler¹⁷³), but also because history suggests that in enforcing what the Court sees as substantial federalism-based limits on national power not clearly drawn from the Constitution's text and structure, the Court is particularly unlikely to elucidate enduring constitutional principles on the inevitably practical, political questions of federalism. The political safeguards of federalism can be given effect through judicially-developed clear statement rules and through a presumption that exemptions Congress sees fit to provide to the federal government (either from liability or particular remedies in federal Article I statutes) ordinarily should be extended to the states as constitutionally sovereign governments. Such a presumption would go far toward meeting Professor Woolhandler's concerns about the capacities for unlimited damages awards to impair the fiscal integrity of the states, for the federal government would be most unlikely to authorize such unlimited awards against itself.¹⁷⁴ While this approach also has

173 See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). For a more extreme version, see JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980). For an excellent contemporary overview, see DAVID SHAPIRO, FEDERALISM: A DIALOGUE (1995), and for an illuminating analysis of how the operation of political parties, organized through state-by-state organizations, facilitate national attention to state problems, see Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485 (1994). I want to resist arguments from the abolition of state legislative selection of the Senators that suggest that the national government will no longer, if once it did, reflect appropriately the interests of the states. See, e.g., *id.* at 1508 (asserting that "direct representation in this body was the chief protection afforded to state institutions in the original plan of the Constitution" and that "this protection basically evaporated with the adoption of the Seventeenth Amendment"). First, note the fundamental ambiguity in the 10th amendment whether the rights being protected are those of the "states" or the "people." Now, consider that the 17th Amendment was intended to *change* the Constitution, and to do so in the direction of giving the views of *the people* in the states more weight in the national legislature than the views of the *state legislatures*. To the extent that the views of the state governments have less weight now than they did before, this is as a consequence of lawful constitutional change and should be accepted as such, rather than being relied on to justify the new judicial activism of the Rehnquist Court's federalism revival. Federal Senators and Representatives still have to run for office from districts bounded by state lines, and still frequently emerge from prior experience in local and state office. See *id.* at 1509-11. The Gingrich Congress illustrated that if the people want to devolve powers from the federal to the state governments, the political process provides mechanisms to do so. See *supra* note 170.

174 The statute under which the plaintiff in *Florida Prepaid* sued provided that states and state entities "shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity." 35 U.S.C. § 271(h)

its difficulties,¹⁷⁵ I offer it to suggest that abandoning reliance on an expansive constitutional doctrine of state sovereign immunity doctrine need not abandon all judicial review of remedies against the states.

CONCLUSION

The Court's present position—that Congress has substantive law-making power to subject states to the federal minimum wage, or patent laws, but does not have power to authorize enforcement of those laws through ordinarily available judicial remedies—is unstable. It flies in the face of modern notions of justice, of basic principles of the supremacy of federal law, and of the "axiom" that the judicial power in a well-designed government is coextensive with the legislative and is thus difficult to defend. Professor Woolhandler's article intriguingly suggests that "giving up" the authority to subject states to private suits

(1994 & Supp. 1997). Compare 35 U.S.C. §§ 283–85 (1994 & Supp. 1997) (containing the general provisions of the patent laws, which authorize injunctions, damages including treble damages, and in exceptional cases attorneys fees), with 28 U.S.C. § 1498 (1994 & Supp. 1997) (providing that infringement actions against the United States shall be brought in the United States Court of Federal Claims for recovery of "reasonable and entire compensation," and authorizing attorney fees in suits by particular plaintiffs only and subject to defense by the United States that its position was substantially justified, but not authorizing injunctive relief). For dueling descriptions of the magnitude of these differences in the majority and dissenting opinions, see *Florida Prepaid*, 119 S. Ct. at 2216 n.11, and *id* at 2218 n.15 (Stevens, J., dissenting). Note that Justice Stevens seeks to justify the unavailability of injunctions on "uniquely federal" grounds, that they would interfere with military procurement. See *id*. Whether this would justify the differential remedial treatment of the state and federal governments as against a claimed burden on state sovereignty, should my proposed alternative doctrine be adopted, is a question for another day.

175 The difficulties arise because there are a number of arguably legitimate reasons for Congress to extend remedies against states and not to the national government—for example, if states engage in a particular commercial activity, e.g., college savings funds, or community health care—that the federal government does not. Cf. *supra* note 174 (noting asserted military justification for limiting patent remedies against the federal government). Where the presumption described above is not met—that is, where states are subject to remedies under Article I statutes that do not apply to the federal government—the states' objections would need to be evaluated in a contextually sensitive and sensible way. It may be unavoidable in such an analysis to revisit some version of the "traditional government functions" test disavowed by the Court in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). Since the Court has implied that some sort of contextualized balancing may be appropriate in deciding whether "generally applicable" laws such as the Fair Labor Standards Act can be applied to the states, this may not be so great a drawback. See *Printz v. United States*, 521 U.S. 898, 932 (1997) (citing with apparent approval *National League of Cities v. Usery*, 426 U.S. 833 (1976)).

might be the pragmatic cost to bear for sustaining federal power to impose substantive regulations on the states. But if so, the costs of accepting such a regime should not be minimized, and especially by academics: Although the current global trend is increasingly to subject governments to the rule of law, the regime Woolhandler approves and that the Court has created elevates apparent improvements in material welfare over the rule of law by permitting Congress to extend laws promoting the national economy to the states but making past violations of such laws in large measure cost-free to infringing state governments.

Let me return to an opening comment. It is rare for an opinion of an Article III court, including the Supreme Court, to invoke justice as a basis for decision.¹⁷⁶ I suppose the fear is that invoking justice might be a signal that the "personal preferences" of the judges are in play, rather than the "law."¹⁷⁷ The opposition of "law" to "justice" raises large jurisprudential issues that I cannot address here. But let me suggest that in the realm of sovereign immunity, recognizing its unjust effects is not a simple preference but a widely and long-held understanding, going back in the Court's cases to *Lee* (1882) and to the majority opinions in *Chisholm* (1793), that sovereign immunity is in some respects unjust. Surely the adoption of the narrowly worded Eleventh Amendment need not be understood to have endorsed that injustice as a general proposition, given the Preamble to the Constitution. Judicial deference to congressional processes, coupled with the principle "when in doubt let justice be done," should have dictated different results in these cases.

176 In law reviews, however, at least two current Supreme Court Justices have invoked justice as a basis for serious reexamination of sovereign immunity doctrines. In 1993, three years before *Seminole Tribe* overruled *Union Gas* to begin the current expansionary wave immunizing states from private liabilities for violations of federal law, Justice Stevens wrote,

In suggesting a broader examination of the entire doctrine of sovereign immunity, I endorse the views expressed in an unusually perceptive article written by an associate professor of law at the University of Virginia in 1970 . . . referring to an area in which he thought that the doctrine of federal sovereign immunity had "made its most blatant affront to the basic precepts of justice."

Stevens, *supra* note 6, at 1129 (quoting Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public Lands Cases*, 68 MICH. L. REV. 867, 868 (1970)).

177 Cf. Robin West, *Toward Humanistic Theories of Legal Justice*, 10 CARDOZO STUD. L. & LIT. 147 (1998) (noting influence of Justice Holmes's comment that "when lawyers in his courtroom make appeal to *justice*, he stops listening").